

**CAPITAL CASE: EXECUTIONS SET OCTOBER 9, 2013 at 10:00 A.M.  
AND OCTOBER 23, 2013 at 10:00 A.M.**

No. 13-16978

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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EDWARD HAROLD SCHAD

Appellant-Petitioner

AND

ROBERT GLEN JONES, JR.

Intervenor-Plaintiff

v.

JANICE K. BREWER, ET. AL

Appellee-Respondent

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA  
OPENING BRIEF OF EDWARD HAROLD SCHAD AND ROBERT GLEN JONES, Jr.

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### **STATEMENT OF JURISDICTION**

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202. Appellants appeal from the denials of preliminary injunctive relief and reconsideration pursuant to Fed. R. Civ. P. 59. This Court has jurisdiction. 28 U.S.C. § 1292(a)(1).

### **STATEMENT OF ISSUES**

Where Appellants presented evidence Appellee Governor and her staff made object lessons of recent clemency board members who voted for clemency and this message was communicated to the current board, but Appellants presented only self-serving statements they would be impartial, did the district court improperly find there were no serious questions or likelihood of success meriting a preliminary injunction to resolve these issues where executions are imminent?

### **STATEMENT OF CASE**

On September 26, 2013, Appellant Schad filed a complaint alleging Appellees deprived him of his right to due process. He sought equitable, declaratory, and injunctive relief pursuant to 42 U.S.C. §§ 1983 and 1985. (ER1-27.) Appellant Jones intervened in Schad's action. (ER342.) Appellants then requested a temporary restraining order ("TRO") and/or a preliminary injunction. (ER117-136.) Appellees' reply to that request revealed a factual dispute and

Appellants served subpoenas to Appellees requesting the production of documents. (ER212-214.)

Appellants did not disclose the documents, and the court later quashed the subpoenas. (ER336-337.) After a hearing on October 1st, the district court denied Appellants a TRO and preliminary injunction. (ER336-337, 342-356.)

The court required witness Melvin Thomas to produce a relevant document by October 3. (ER336-37.) Within hours of Thomas' submission, Appellants asked the court to withdraw its denial; the court declined. (ER363-69,365-70,377-378.)

#### **STATEMENT OF FACTS**

Appellants are currently under warrants of execution in Arizona; their executions are scheduled for October 9 and 23, 2013.

The Board is an independent public body created to act as a check on the Governor's authority to grant clemency. *Laird v. Sims*, 147 P. 738, 739-40 (1915); Arizona Revised Statutes ("A.R.S.") §31-401. The Governor appoints members of the Board to five-year staggered terms, the purpose of which is to ensure no particular Governor will have complete control over appointments. Governor Brewer cannot grant clemency unless the Board issues a favorable recommendation, which requires a majority of the Board's votes. A.R.S. §31-402(A).

Duane Belcher was appointed to the Board in 1992, and served as its Chairman/Executive Director. (ER230.) Belcher voted to recommend clemency in the high-profile cases of Macumber and Flibotte. In early 2012, Appellee Smith met with Belcher, “made it clear” the Governor’s office was unhappy with his votes, and did so “in an aggressive manner.” (ER105-106,241-247.) At this time, current Board members, Appellees Jack LaSota and Ellen Kirschbaum, were on the Board with Belcher and he testified he likely communicated this information to them. (ER247.)

In April 2012, the Governor ousted Belcher and two other Board members, Ellen Stenson and Marilyn Wilkens. (ER106-107.) The sudden ouster of three Board members was unprecedented. (ER106-107.) As with Belcher, Appellee Smith called Stenson and Wilkens in separately for private interviews in which he was “combative” and expressed his and the Governor’s displeasure with their votes. (ER107-109.) Each believed they were ousted “because the Governor’s office does not want to receive clemency recommendations from Board members in high-profile cases.” (ER106-107,110.)

Jesse Hernandez, who served as the Chairman from April 2012 until he resigned in August 2013, was also called in by the Governor’s staff for “come to Jesus” meetings: Smith lectured him about the Board’s prior clemency recommendations. (ER113-114.) “It was crystal-clear to [him] that Mr. Smith was

telling [him] that, as the new Chairman, [he] was expected to ensure that the Board not recommend clemency in particular kinds of cases.” (*Id.*) Hernandez understood he was to ensure the Board did not recommend clemency in high-profile cases. (*Id.*) Kirschbaum and Thomas corroborated Hernandez’s suggestions that he communicated the Governor’s wishes to the Board. (ER111,262,310.) Smith has not denied these meetings. The Court took all factual allegations not denied as true.

All current Board members are aware that Belcher, Stenson, and Wilkens believed they were terminated because of their votes for clemency in high-profile cases. (ER111,114,187,261,306.) Appellee Kirschbaum insisted she did not know whether the prior Board members were terminated based on their votes, but acknowledged knowing that is what prior Board members think. (ER306.) She also testified she had never been contacted by anyone in the Governor’s office regarding her votes. (ER301-302.)

Kirschbaum’s testimony is now in question based on testimony at the hearing and subsequent evidence submitted to the court. According to Thomas’s testimony and information he revealed after the hearing, Kirschbaum told Thomas that prior Board members were terminated based on their votes and, indeed, attempted to “goad” and intimidate him with this information, insinuating that he too would lose his job if his votes displeased the Governor.



Thomas testified that someone who was not a current Board member showed him a portion of a letter which demonstrated the Governor was unhappy with “several Board members’ decisions on a particular case.” (ER256.) He testified he thought the person had showed him the letter to “goad” and intimidate him. (ER258-259.) Thomas also testified he thought the person was not supposed to show the letter to him. (ER258.) He testified that the portions of the letter he saw referred “to comments and a particular vote of the Board may have jeopardized the positions of the other three Board members that were being replaced.” (ER259.)

After the hearing, Thomas submitted to the court what he claimed to be the letter. (ER357-363.) Despite testifying that the person who had shown him the letter and tried to intimidate him was not a member of the Board, his submission to the court revealed “Ms. Kirschbaum was the source of the letter.” (ER357.) He also claimed they discussed the letter “regarding why she and others felt former board members had not been re-appointed.” (*Id.*) The letter Thomas attached was simply the Board’s letter recommending clemency in Flibotte’s case, which is not a confidential document. (ER360-363.)

Despite knowledge that former Board members were not reappointed and lost their jobs on account of their votes, the current Board members each testified they do not fear losing their jobs based on their votes. (ER298,304,312.) Board member LaSota, though, revealingly testified he does not fear losing his job if he

votes for clemency because, “the only danger is *if one desires to be reappointed*, then it becomes a decision on your future is in the hands of the Governor’s Office.” (ER298.) (Emphasis added.) This is an admission that the Governor’s Office threatens board members with financial retaliation.

### **SUMMARY OF ARGUMENT**

Appellants appeal the district court’s denial of preliminary injunctive relief and denial of their Rule 59 motion. First, the district court made erroneous fact findings regarding the credibility of witnesses and relied on those findings to deny relief.

Second, the court improperly found Appellants had not shown “serious questions” going to the merits of their claims. Appellants’ evidence and information that came to light after the hearing demonstrates there are serious questions that the Governor and her agents interfered with the independent Board and current members cannot afford Appellants a full and fair clemency process. Considering all of the relevant factors the district court abused its discretion in denying Appellants relief.

### **STANDARD OF REVIEW**

This Court reviews the denial of a preliminary injunction for an abuse of discretion. *Diouf v. Napolitano*, 634 F.3d 1081,1084 (9th Cir. 2011). Where Appellants allege the court relied on an “erroneous legal premise,” this Court

reviews the underlying legal issues de novo. *Klein v. City of San Clemente*, 584 F.3d 1196,1200 (9th Cir. 2009).

### **ARGUMENT**

#### **I. THE DISTRICT COURT ABUSED ITS DISCRETION BY BASING ITS DECISION ON CLEARLY ERRONEOUS FACT FINDINGS.**

The district court's denial of preliminary injunctive relief relied heavily on self-serving statements of current Appellee Board members that they are impartial, and actions by the Governor have no bearing on their votes. (ER355.) The court's finding that the current Board members are credible was clearly erroneous as described below. The court abused its discretion in denying Appellants preliminary injunctive relief. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,1131 (9th Cir. 2011)(internal citation omitted)(abuse of discretion if court based decision on clearly erroneous fact findings).

Testimony during the hearing and information revealed after the hearing demonstrates serious questions regarding Appellee Kirschbaum's credibility. Thomas testified that a mysterious person showed him a letter to intimidate and goad him to vote in accordance with the Governor's wishes. (ER258-259.) He explained that the person indicated Board members' "ability to be objective" was "jeopardized." (ER259.) After the hearing, he revealed this person was Kirschbaum. (ER357-358.) Kirschbaum, however, swore she did not know the

reason three Board members were ousted, and that no one from the Governor's office expressed displeasure with her votes. (ER301-302,306,310.) The district court gave "as much credit to the former Board members' testimony as credible as . . . to the present Board members'." (ER324.) The court gave equal credit to Thomas as to Kirschbaum. Both credibility findings cannot be correct. Moreover, the district court relied heavily upon the credibility of the current Board members, including Kirschbaum, in denying Appellant's motions. It abused its discretion. *See Wild Rockies*, 632 F.3d at 1131.

Further, the district court's denial of reconsideration overlooked the serious questions described in detail above. The court's finding that Thomas' disclosure did not "call[] into question Kirschbaum's credibility" was clearly erroneous and constituted an abuse of discretion. (ER378.)

## **II. THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING APPELLANTS WERE NOT ENTITLED TO A PRELIMINARY INJUNCTION.**

To obtain a preliminary injunction, Appellants must show (1) serious questions going to the merits of the claims; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *Wild Rockies*, 632 F.3d 1127. "[S]erious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff" can support a preliminary injunction where plaintiff also shows there

is a likelihood of irreparable injury and “the injunction is in the public interest.” *Wild Rockies*, 632 F.3d at 1135.

**A. SERIOUS QUESTIONS GO TO THE MERITS OF APPELLANTS’ CLAIMS.**

Appellants have a constitutionally protected interest in their lives, which the State may not deprive them of without due process of law. U.S. Const. amend. XIV. Clemency is among the very last proceedings standing between Appellants and their imminent executions. Thus, clemency is considered a “fail safe” in our criminal justice system, *Herrera v. Collins*, 506 U.S. 390, 415 (1993). A majority of the United States Supreme Court has found Plaintiffs are entitled to minimum due process guarantees at their clemency hearings, including the opportunity for a fair hearing and decision-makers who do not act in an arbitrary and capricious manner.<sup>1</sup> *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288, 290-91 (1998) (O’Connor,J., concurring in result) (Stevens,J., concurring in part, dissenting in part) (death sentenced prisoner possessed “life interest” entitling him to at least moderate standards of fairness and due process in parole process).

The district court assumed that minimum due process in clemency proceedings includes access to an impartial decision-maker, but held Appellants did not demonstrate they lacked access to an impartial clemency process.

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<sup>1</sup> As the District Court recognized, Arizona has set out by statute “what the due process requirements are for clemency matters.” (ER286.) *See* A.R.S. §§38-401, -401.02; 31-401--403.

(ER354.) The court placed undue emphasis on Appellees' self-serving statements while ignoring evidence that raised serious questions going to the heart of Appellants' claims.

The core of Appellants' claims is that Appellee Brewer and her agents have intimidated Board members to produce a desired result regarding their votes in high-profile cases. Appellees Brewer and Smith have made object lessons of fired Board members. That message has been communicated to current Board members. This interference with the Board violates minimal due process: decision-makers have a personal and financial interest in their votes and can lose their jobs if they do not vote in accordance with the Governor's arbitrary and capricious wishes. *Woodard*, 523 U.S. at 290-91 (Stevens, J., concurring in part and dissenting in part) (minimal due process protects against, at the very least, procedures infected by bribery, personal or political animosity, or deliberate fabrication of evidence). The executive's interference in the legislatively-designed independent Board violates minimal due process. *Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000) (state officials must refrain from frustrating clemency process by threatening or intimidating board members, engaging in mere farce of clemency proceeding, and violating governing law); *see also Wilson v. United States Dist. Ct. for the Northern Dist. of California*, 161 F.3d 1185 (9th Cir. 1998) (due process violation

where Governor misled prisoner's counsel about issues to be considered in clemency proceeding).

The evidence before the district court showed Board members understood the Governor did not re-appoint three ousted Board members because of their votes in high-profile cases. Indeed, the district court found: "Governor Brewer's failure to reappoint certain Board members was driven, at least in part, by dissatisfaction with those members' past votes." (ER348.) Defendant LaSota admitted there is a danger to Board members who seek reappointment if the Governor is displeased with their vote.

The evidence also established that current Board members knew the Governor would not reappoint them if she did not like their votes. (ER298-299.) Further, Appellee Kirschbaum attempted to intimidate and "goad" Thomas by discussing the Governor's displeasure with the Board's votes. (See ER256,258-259,357.) Tellingly, Kirschbaum denied this behavior and that she was the person who sought to intimidate Thomas only came to light after the hearing. Appellants were thus denied the opportunity to cross-examine Thomas and Kirschbaum.

Appellants presented corroborated testimony that the Governor's staff held meetings with the former Chairman to influence members' votes. (ER111,113-114,262,310, 314.) Current Board members Livingston, LaSota, and Kirschbaum

were all on the Board while Hernandez was Chairman and relayed messages from the Governor's office.

Despite this, the court found Appellants presented no evidence that Appellee Board members would be partial. (ER354.) This clearly erroneous finding ignored the evidence that Appellees made an object lesson of ousted Board members and communicated that to current members. Appellees' self-serving and now-impeached statements, contrary to other evidence in the record, are not sufficient to dissolve the serious questions presented here. The court improperly denied preliminary injunctive relief finding Appellants "failed to establish a likelihood of success or serious questions going to the merits." (ER356.) Given these disputes, Appellants are at least entitled to discovery.

**B. APPELLANTS SATISFY EACH REMAINING REQUIREMENT FOR RELIEF.**

The district court improperly found that "in addition to not satisfying the first requirement for obtaining injunctive relief, the remaining factors support the denial of injunctive relief." (ER356.) An analysis of the likelihood of irreparable harm, the balance of equities, and the public interest demonstrates the district court improperly denied relief.

As the district court correctly noted, "without any doubt, there is the likelihood of irreparable harm." (ER229; *see also* ER356.) Appellants have an interest in their lives. *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring). The



deprivation of their lives without clemency proceedings conducted in accordance with due process is particularly egregious because clemency should serve as a “fail safe” in our justice system. *Herrera*, 506 U.S. at 415. Without injunctive relief, the State will soon execute Appellants before they can prove their claims through discovery or participate in full and fair clemency proceedings.

The balance of equities tips in Appellants’ favor. *See Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980) (standards for granting preliminary injunction impose duty to balance interests of all parties and weigh damage to each). Appellants will suffer the irreparable deprivation of life without clemency proceedings conducted in accordance with due process. The harm to Appellees of a preliminary injunction is minimal.

The relief Appellants seek would only last the time it takes the Board to ensure it is fully independent of the Governor’s office. *See Nelson v. Campbell*, 541 U.S. 637, 644 (2004) (upon resolution of § 1983 claim, State can go forward with sentence). Further, any delay in Appellants’ sentences is attributable to Appellees’ actions preventing a full and fair clemency determination.

The public has an interest in an independent Board, open meetings, and the enforcement of constitutional rights. *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005)(public interest concerns implicated when constitutional right violated); *see also Sammartano*, 303 F.3d at 974 (courts considering preliminary

injunctions have consistently recognized significant public interest in upholding constitutional principles). Appellees have acted to defeat these public interests.

### **CONCLUSION**

For the reasons above, Appellants respectfully ask this Court to reverse the district court's denial of a TRO/preliminary injunction.

Respectfully submitted this 5<sup>th</sup> day of October, 2013.

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**CERTIFICATE OF COMPLIANCE**

I certify that the foregoing Consolidated Petition for Rehearing and Suggestions for Rehearing *En Banc* and Motion for Stay of Execution contains 2795 words, excluding the required certificates..

/s/ Kelley J. Henry  
Counsel for Mr. Schad

**CERTIFICATE OF SERVICE**

I hereby certify that on October 5, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit. I also certify that I emailed a copy of the same to counsel, Dale Baich, Kelly Gibson and Brian Luse. I further certify that I emailed copies to Ms. Kristine Fox, Capital Case Staff Attorney for the District of Arizona and Ms. Margaret Epler, Capital Case Staff Attorney for the Sixth Circuit.

Kelley J Henry  
Counsel for Edward Schad

**CAPITAL CASE: EXECUTIONS SET OCTOBER 9, 2013 at 10:00 A.M.  
AND OCTOBER 23, 2013 at 10:00 A.M.**

No. 13-16978

UNITED STATES COURT OF APPEALS  
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EDWARD HAROLD SCHAD

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AND

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA  
EXCERPT OF RECORD

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

EDWARD HAROLD SCHAD, JR.,

Plaintiff,

vs.

JANICE K. BREWER,  
Governor Of The State Of Arizona, In  
Her Official Capacity,

SCOTT SMITH,  
Chief Of Staff To Governor Brewer,  
In His Official Capacity

BRIAN LIVINGSTON,  
Chairman and Executive Director,  
Arizona Board of Executive Clemency

JOHN "JACK" LASOTA,  
Member, Arizona Board of Executive  
Clemency, In His Official Capacity

ELLEN KIRSCHBAUM,  
Member, Arizona Board of Executive  
Clemency, In Her Official Capacity

DONNA HARRIS,  
Member, Arizona Board of Executive  
Clemency, In Her Official Capacity

Defendants.

No. \_\_\_\_\_

**COMPLAINT FOR  
EQUITABLE, INJUNCTIVE,  
AND DECLARATORY  
RELIEF [42 U.S.C. §1983; 42  
U.S.C. §1985(3)]**

DEATH PENALTY CASE -  
EXECUTION SET FOR  
OCTOBER 9, 2013 10:00 AM

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## **NATURE OF ACTION<sup>1</sup>**

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations by the Office of the Governor, the Arizona Board of Executive Clemency (“the Board”) and its members who, while acting under color of state law, have violated the rights of Plaintiff to due process of law and to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

2. This Complaint does not challenge Plaintiff’s underlying capital conviction or sentence of death. Rather, Plaintiff challenges the absence of procedures for him to fully and fairly present his case for commutation of his sentence of death to the Board.

3. Plaintiff seeks equitable, injunctive, and declaratory relief to prevent Defendants from holding a commutation hearing, in the absence of full, fair, independent available process that would permit a full and fair presentation of Plaintiff’s case for commutation and to enjoin his execution until such time as a full and fair clemency process becomes available.

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<sup>1</sup> It should be noted that this complaint is filed under exigent circumstances by Schad’s appointed counsel whose primary practice involves cases brought pursuant to 28 U.S.C. §2254. Plaintiff should not be punished for any defect in pleading under the circumstances but should be granted leave to amend as necessary.

## **JURISDICTION AND VENUE**

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343 (civil rights violations), 28 U.S.C. § 1367 (supplemental), 28 U.S.C. § 2201 (declaratory relief), and 28 U.S.C. § 2202 (injunctive relief). Plaintiff invokes this Court's jurisdiction pursuant to Article III of the United States Constitution, the Eighth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §1983, and 42 U.S.C. §1985(3).

5. Venue is proper pursuant to 28 U.S.C. § 1391(b). Plaintiff is currently incarcerated at the Arizona State Prison Complex ("ASPC") – Eyman, Browning Unit, 4374 East Butte Avenue, Florence, Arizona, which is located within the District of Arizona. His inmate number is 40496.

6. The Office of the Governor, the Arizona Board of Executive Clemency and all Defendants' offices are in Phoenix, Arizona, which is within the District of Arizona.

## **THE PARTIES**

7. Plaintiff Schad is a United States citizen and resident of the State of Arizona. He is held under color of state law subject to a sentence of death imposed by the Superior Court of Yavapai County.

8. Plaintiff Edward Harold Schad is under a warrant of execution. His execution has been scheduled for October 9, 2013.

9. His execution is scheduled to take place at the Central Unit at ASPC – Florence within the state of Arizona and within this judicial district.

10. Defendant Janice K. Brewer is the Governor of the State of Arizona and is being sued in her official capacity for equitable relief.

11. Defendant Scott Smith is the Chief of Staff to the Governor of Arizona and is being sued in his official capacity for equitable relief.

12. Defendant Brian Livingston is the Chairman and Executive Director of the Arizona Board of Executive Clemency and is being sued in his official capacity for equitable relief.

13. Defendants John “Jack” LaSota, Ellen Kirschbaum, and Donna Harris are members of the Arizona Board of Executive Clemency and are being sued in their official capacities for equitable relief.

14. There is presently one vacancy on the five-member Board.

#### **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

15. Exhaustion is not necessary under the Prison Litigation Reform Act (“PLRA”), 42 U.S.C. § 1997e, because this suit does not challenge prison conditions and because there are no available administrative remedies that could address the challenged federal constitutional and state statutory violations.

16. It would be futile for Plaintiff to attempt to exhaust any remedies available to him in an effort to resolve this issue.

17. Upon learning of the allegations contained in this complaint, Plaintiff, by counsel, requested each member of the Board to recuse themselves from the scheduled reprieve/commutation hearing. Attachment A. The Board refused to comply with Mr. Schad's request. Attachment B.<sup>2</sup>

## RELEVANT FACTS

### I. FACTS RESPECTING PLAINTIFF'S REQUEST FOR EXECUTIVE CLEMENCY (SENTENCE COMMUTATION)

17. Plaintiff incorporates by reference each and every statement and allegation set forth throughout this Complaint as if fully rewritten.

18. Plaintiff was convicted and sentenced to death for the murder of Lorimer Grove. *State v. Schad*, 633 P.2d 366 (Ariz. 1981). His conviction was overturned due to an instructional error. *State v. Schad*, 691 P.2d 710 (Ariz. 1984). He was re-tried and once again sentenced to death. *State v. Schad*, 788 P.2d 1162 (Ariz. 1989). Plaintiff sought review in the United States Supreme Court which was granted. In a 5-4 decision, the Court affirmed the decision of the Arizona Supreme Court that the jury was not required to unanimously agree on a single theory of first-degree murder and that a lesser included instruction on the offense

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<sup>2</sup> Mr. LaSota was the only Defendant to provide a written response. It is an unsigned, unsworn letter which was emailed to undersigned counsel from Mr. LaSota's official email address. No other board members responded. Their failure to respond is taken as a constructive denial of Plaintiff's request that they recuse themselves. It is unclear whether Defendant Harris intends to vote at the scheduled hearing as she has not received her statutorily mandated training and as of this date is not listed as a member of the Board on the Board's official website. [www.azboec.gov](http://www.azboec.gov).

of robbery was not required. *Schad v. Arizona*, 501 U.S. 1277 (1991), *reh'g denied*, 501 U.S. 1277 (1991). Plaintiff promptly sought state post-conviction relief which was denied. Plaintiff next sought relief from his conviction and sentence by filing a petition for writ of habeas corpus which was denied. The opinion of the Court was affirmed on appeal. *Schad v. Ryan*, 671 F.3d 708(9<sup>th</sup> Cir. 2011).

19. On January 8, 2013, the Arizona Supreme Court issued a warrant for Plaintiff's execution to take place on March 6, 2013. In response to the warrant the Board scheduled a commutation/reprieve hearing to take place on February 27, 2013. Plaintiff indicated that he wished to participate in a clemency hearing and submitted materials to the Board in support of his request that his sentence to be commuted to life imprisonment. Attachment C (Commutation Request)(collective). On February 26, 2013, the Ninth Circuit Court of Appeals granted Plaintiff's request to remand his habeas case to this Court. *Schad v. Ryan*, 07-99005, 2013 WL 791610, \*3 (9<sup>th</sup> Cir. Feb. 26, 2013). In accordance with the policies and procedures of the Board, Plaintiff's hearing for reprieve/commutation was cancelled as it appeared he had available judicial remedies. Plaintiff's request for sentence commutation remains pending. Attachment D, email correspondence. The Ninth Circuit's February 26, 2013 Order was subsequently vacated by the United States Supreme Court. *Ryan v. Schad*, 133 S. Ct. 2548 (2013).

20. On September 3, 2013, the Arizona Supreme Court issued a new warrant for Plaintiff's execution setting the date for October 9, 2013. The Board re-scheduled Plaintiff's reprieve/commutation hearing for October 2, 2013. Attachment D.

21. Thereafter, Plaintiff became aware of the following facts.

## **II. FACTS RESPECTING THE BOARD**

22. The Arizona Board of Executive Clemency is an independent public body created by the Arizona State Legislature to act as a check on the Governor's authority to grant clemency. ARS §31-401.

23. The members of the Board are appointed by the Governor to five year staggered terms. ARS §31-401. The purpose of the staggered terms serves to ensure that no particular Governor will have complete control over the appointments to the Board with the intent of maintaining neutrality amongst the members. All current members of the Board were appointed by Governor Brewer.

24. Each newly appointed board member must complete a four week training course "relating to the duties and activities of the board." ARS §31-401(C).

25. Board members may only be removed by the Governor and only for cause. ARS §31-401(E).

26. The Board is subject to the Arizona Open Meetings law. ARS § 38-431.

27. The open meetings law states:

All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. All legal action of public bodies shall occur during a public meeting.

ARS §38-431.01(A).

28. A meeting “means the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action.” ARS §38-431(4).

29. A quorum of the Board is generally considered three members, but can be as few as two members. ARS §31-401(I).

30. Under the open meetings law, “legal action” “means a collective decision, commitment or promise made by a public body pursuant to the constitution, the public body's charter, bylaws or specified scope of appointment and the laws of this state.” ARS §38-431.

31. The Governor of the State of Arizona is not empowered to grant a request for executive clemency unless the Board issues a favorable

recommendation. A tie vote is interpreted as a denial of executive clemency and deprives the Governor of the authority to grant an application.

**III. FACTS RESPECTING THE ACTIVITIES OF THE CLEMENCY BOARD AND EFFORTS MADE BY AND/OR ON BEHALF OF THE OFFICE OF THE GOVERNOR TO INFLUENCE THE DECISIONS OF THE BOARD**

32. On or about April 9, 2012, Jesse Hernandez was appointed to the Board of Executive Clemency as Chairman and Executive Director. Hernandez replaced Duane Belcher who had sought to be reappointed to the position he had held for two decades.

33. On or about April 9, 2012, Melvin Thomas was appointed to the Board.

34. On or about April 10, 2012, Brian Livingston was appointed to the Board.

35. Mr. Thomas and Mr. Livingston were appointed to replace Members Ellen Stenson and Marilyn Wilkens.

36. Mr. Belcher, Ms. Stenson, and Ms. Wilkens had each applied to retain their appointments to the Board.

37. Mr. Belcher was not afforded an interview and his name was not forwarded to the Governor as a nominee for his position. Attachment E, Declaration of Duane Belcher. In his sworn declaration, Belcher states:

I served on the Board for approximately 20 years. When Governor Brewer decided to replace three Board members (including myself) at



one time, I was quite surprised. During my tenure with the Board, I had never seen a time where an Arizona Governor had replaced so many Board members at one time. It was my opinion that the Governor's office wanted Board Members who would vote the wishes of her office, rather than vote their conscience, based on the facts and circumstances of each case.

*Id.* Mr. Belcher further explains that he came to that opinion based on his interaction with Defendant Smith, and other acting as agents for Defendant Governor Brewer.

In early 2012, I had a meeting with Joe Sciarotta and Scott Smith, General Counsel and Deputy Chief of Staff to Governor Brewer. They were direct, and made it clear to me, that the Governor's office was unhappy with my vote to recommend clemency for William Macumber in 2009 and again in 2011. I was told that the Governor was "blindsided" by the Board's vote to recommend Clemency in the Macumber case. They also questioned me regarding the Board's vote to recommend clemency in the case of Robert Flibotte ADC #265716. The aforementioned were considered to be high profile cases.

*Id.* As a result of this meeting, the former Chairman concluded, "In my view the Governor's Office was attempting to influence the Board's vote in certain cases that were recommended for executive clemency." *Id.*

38. Ms. Stenson was afforded an interview. Ms. Stenson's interview was held in executive session without proper notice of such. The Governor's Chief of Staff, Defendant Scott Smith, "ran the show." Appendix F, Declaration of Ellen Stenson. During the interview, Mr. Smith asked Ms. Stenson if she stood by her 2009 vote to recommend commutation for Bill Macumber. *Id.* Mr. Macumber's

case had brought national attention because of a persuasive case of innocence. At the time the question was asked, it was apparent to all involved that Mr. Macumber's case could "quite possibl[y]" come before the Board in the future. *Id.* Ms. Stenson informed Mr. Smith that she stood by her 2009 vote. Ms. Stenson's name was not forwarded to the Governor for nomination. She was not re-appointed. Ms. Stenson believes that her 2009 vote together with her answer that she would vote the same way "influenced the Governor's decision to oust [her] from the Board." *Id.*

39. Marilyn Wilkens was similarly removed from her seats by the Governor in retaliation for her votes recommending clemency in a high profile case. Ms. Wilkens was interviewed. Similar to Ms. Stenson, Ms. Wilken's interview was held in executive session without prior notice. "When I arrived for my interview, I learned that it would be conducted in an executive session, rather than in a public forum. This struck me as unusual. Had I been informed and been aware that I could object to the closed-door discussion, I would have expressed my concern and requested that my interview be conducted in a public session." Attachment G.

40. Like, Stenson, Wilkens was also questioned about her vote on a high-profile case:

During my reappointment interview in executive session, it was explained that there was dissatisfaction with my vote on a particular

commutation of sentence case; I was informed that I had not voted in accordance with the way the Governor's staff (representing the Governor in the interview), had preferred as an outcome on the case, clearly then indicating the Governor's Office displeasure with my vote.

Specifically Scott Smith, who at that time was the Deputy Chief of Staff for Governor Jan Brewer, and also a member of the candidate Selection Committee, was displeased that I voted to reduce the sentence of Robert Flibotte, a 74-year first-time male sex offender who had been sentenced to 90 years prison time for possession of child pornography. I explained during my interview, the facts and case history to the Selection Committee members, that I employed in finalizing my decision to vote a recommendation for a reduction in sentence. Mr. Smith was face-to-face with me, with about five inches separating us. He was shaking his finger at me and told me in a raised voice, almost yelling at me, that I voted to let a “sex offender” go. He became very agitated, refusing to accept the tenets of my explanation, which outlined that Mr. Flibotte would be under probation the remainder of his life and also supervised by Gila County Probation Services and would be required to publicly register as a sex offender. This discussion concluded my candidate interview with the Committee.

Attachment G.

41. Ms. Wilkens also believes that she was not reappointed because of her voting record and intent to remain independent of the Governor.

I have concluded that I was not reappointed to continue my service with the Board because the Governor's office does not want to receive clemency recommendations from Board members in high-profile cases.

Attachment G.

42. The fact that the previous members had been removed as punishment for their votes was made known to the new appointees who replaced them. Former Member Melvin Thomas, who resigned from the Board in August, 2013, declares, “I was aware that three Board members who left before me were forced out because each one had recommended clemency in on or more cases that got sent up to Governor Brewer.” Attachment H, Declaration of Melvin Thomas. Thomas also stated, “The other members of the Board while I served were also aware that their predecessors lost their jobs because of how they voted.” *Id.*

43. Mr. Thomas swore under oath that, “At least one Board member who had voted for clemency received a letter from the Governor’s office informing him or her that the Governor was displeased with his or her vote. I know about this letter because one of the individuals who received one showed it to me.” *Id.*

44. During the time Mr. Thomas and Mr. Hernandez served on the Board members of the Governor’s staff acting as agents of the Governor, including Defendant Smith, openly and overtly attempted to influence the votes of the Board on pending matters. Mr. Thomas swore, “On more than one occasion, Chairman Hernandez informed the Board members that Governor Brewer was unhappy with one of our recent decisions or that she would be unhappy if we voted a certain way in an upcoming case. Mr. Hernandez indicated that he was getting his information from the Governor’s office.”

45. Although the Board was created by the Arizona legislature to be an independent body, under Governor Brewer the Board is not independent, at least with respect to high profile cases. Former Chairman Hernandez learned this shortly after being appointed to the Board. Mr. Hernandez has declared under oath, “Soon after I took office I learned that the Board is not independent of the Governor.” Attachment I.

46. Defendant Smith, acting on behalf of Defendant Governor Brewer, summoned Hernandez to his office for what Hernandez describes as “come to Jesus” meetings. *Id.* In the first meeting, Defendant Smith, “lectured [Hernandez] about Governor Brewer’s policy to be tough on crime. [Smith] said, ‘We don’t want another Macumber of Flibotte.’ [Hernandez] immediately understood this to mean that Governor Brewer was directing [Hernandez] not to recommend clemency in high-profile cases.” *Id.*

47. Mr. Hernandez has declared that he knew who Defendant Smith was referring to when he mentioned Macumber and Flibotte. He was aware that Mr. Macumber’s case has garnered national attention and that the previous board had recommended clemency and Governor Brewer had twice denied Macumber clemency. He also knew that Macumber’s son had confronted Brewer at a press conference, embarrassing her and causing her to “shut it down.” *Id.* Mr. Hernandez knew that Flibotte who was serving 90 years for downloading child

pornography. The previous board had voted for a partial commutation of sentence. *Id.* Mr. Hernandez declares, “It was crystal-clear to me that Mr. Smith was telling me that, as the new Chairman, I was expected to ensure that the Board not recommend clemency in particular kinds of cases.” *Id.*

48. Defendant Smith summoned Hernandez to several more “come to Jesus meetings.” Each meeting coincided with a high profile case. Each time, “Smith, or the other members of the Governor’s staff would tell me the Governor’s philosophy that she must be tough on crime. I was also told that it was important to stay in line with these views ‘for the sake of the administration.’ The clear implication was that we were not to vote for clemency in the upcoming case.” *Id.*

49. Hernandez declares that the Governor’s message is well understood by the other members of the Board which includes Defendants Livingston, Kirschbaum and LaSota. Hernandez states, “During my time on the Board, the other members understood clearly that they risked losing their jobs if they voted contrary to the Governor’s wishes and forced her to decide a case that she did not want to decide. For instance, I once mentioned to Ellen Kirschbaum that I noticed that she was ‘always a no’ vote. She agreed and stated that the reason was that she would imagine, ‘What would the Governor think?’” *Id.* See also, Attachment H.

50. As a result of his experiences on the Board, Hernandez concludes, “Because the Board is not independent from the Governor and members are aware

their jobs are at stake, the Board will *never* vote for commutation of a death sentence. There is not even the tiniest sliver of hope that any death-row prisoner will ever get a majority vote recommendation for clemency” *Id.* (emphasis in original). Mr. Hernandez states that any application would be “a waste of time” because the application would be “automatically turned down.” *Id.*

51. With respect to Mr. Schad, specifically, Mr. Hernandez recalls in his sworn declaration, dated September 23, 2013, “A couple of months ago, Brian Livingston sent the Board an email to update us that death-row prisoner Edward Schad had received a stay of execution. I overheard members Kirschbaum, Thomas and Livingston discussing Mr. Schad’s case in the break room. They all agreed that they would not be voting for clemency in his case. Ms. Kirschbaum said something similar to what she had told me before, ‘I could not put my name on that. What would the Governor think?’” *Id.*

## **CLAIMS FOR RELIEF**

### **CLAIM ONE**

**DEFENDANTS' ACTIONS UNDER COLOR OF STATE LAW RENDER IT IMPOSSIBLE FOR PLAINTIFF TO ACCESS THE CLEMENCY PROCESS IN THAT THE DEFENDANTS HAVE CREATED A CLEMENCY PROCESS THAT IS ARBITRARY, CAPRICIOUS AND EFFECTIVELY DENIES ACCESS TO EXECUTIVE CLEMENCY FOR HIGH PROFILE ARIZONA INMATES AND CONSEQUENTLY VIOLATES PLAINTIFF'S DUE PROCESS AND EQUAL PROTECTION RIGHTS AND RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS (42 U.S.C. § 1983)**

52. Plaintiff incorporates by reference each and every statement and allegation set forth throughout this complaint as if fully set forth herein.

53. Plaintiff has a constitutionally protected interest in his life which may not be deprived by the state without due process of law. He is entitled to minimum due process guarantees at his clemency hearing which include the right to reasonable notice and an opportunity for a fair hearing and decision makers who do not act in an arbitrary and capricious manner. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288, 118 S.Ct. 1244, 1253 (1998)(O'Connor, J., concurring in the result). Reading Justice O'Connor's opinion together with Justice Stevens's, a majority of the Court agreed that "[j]udicial intervention might . . . be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.*



54. Arizona's due process protections are even broader, requiring that there "must be a hearing in a substantial sense .... in accordance with the cherished judicial tradition embodying the basic concepts of fair play." *McGee v. Arizona State Bd. of Pardons & Paroles*, 92 Ariz. 317, 376 P.2d 779, 781 (1962) (quotations and citations omitted). See *State Bd. of Pardons & Paroles v. Superior Court*, 12 Ariz.App. 77, 467 P.2d 917, 920, 922 (1970) (Arizona Superior Court has power to review Board proceedings to determine due process in commutation hearing and may return matter to Board for further proceedings); *Banks v. Bd. of Pardons & Paroles*, 129 Ariz. 199, 629 P.2d 1035 (App.I. 1981). Arizona's guarantee of due process animates and strengthens Plaintiff's right to federal due process in executive clemency.

55. In Arizona, the power to commute or grant reprieve of a sentence of death is vested in the governor by Article 5, Section 5 of the Arizona Constitution, and A.R.S. § 31-443 which provides:

The governor, subject to any limitations provided by law, may grant reprieves, commutations and pardons, after conviction, for all offenses, except impeachment, upon conditions, restrictions and limitations [s]he deems appropriate.

56. The power to commute or grant a reprieve of a death sentence is governed by A.R.S. § 31-402(A) which provides:

For all persons who committed a felony offense before January 1, 1994, the board of executive clemency shall

have exclusive power to pass upon and recommend reprieves, commutations, paroles and pardons. No reprieve, commutation or pardon may be granted by the governor unless it has first been recommended by the board.

Thus, Plaintiff is not eligible to have his death sentence commuted nor may he be granted a reprieve without a favorable recommendation from the clemency board.

57. Defendant Smith, acting as the agent of Defendant Brewer, actively sought to influence the votes of the Board in a secretive, arbitrary, and capricious manner. His actions have had a direct and intended negative impact on Plaintiff's ability to even access executive clemency.

58. Here two current board members,<sup>3</sup> in violation of the open meetings act, have already stated, unequivocally, that they will not vote for clemency. There are only four current sitting members on the Board. Defendant Harris, who is newly appointed, is not qualified to sit on Plaintiff's case by statute because she has not received her training. But even if she sat, Schad cannot receive a favorable clemency vote because a tie vote of 2-2 is a negative recommendation. It is thus impossible for Plaintiff to receive a full, fair, independent clemency hearing which is guaranteed to him by statute. Nor can he receive a clemency hearing that

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<sup>3</sup> Defendant LaSota neither admits or denies that this meeting happened. His unsigned, unsworn letter, merely notes that he does not understand the conversations of two members of the Board would constitute an Open Meetings violation. Attachment B. Of course, three Board Members were present which plainly constitutes a quorum and open meeting violation. Further, under the statute two members can be a quorum. LaSota's failure to deny that the meeting occurred could be viewed as a tacit admission of the meeting.

comports with due process where the majority of qualified board members has already determined the outcome of his application based on arbitrary and capricious factors.

59. Furthermore, Defendant Smith's actions on behalf of Defendant Governor Brewer, have so impacted the Board that it is impossible for any death-row inmate to access executive clemency while Governor Brewer holds office. Defendant's actions have rendered the Arizona Executive Clemency process a sham.

## **CLAIM TWO**

**THE FAILURE TO COMPLY WITH ARIZONA'S OPEN MEETINGS LAW VIOLATES PLAINTIFF'S DUE PROCESS AND EQUAL PROTECTION RIGHTS AND RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS (42 U.S.C. § 1983)**

60. Plaintiff incorporates by reference each and every statement and allegation set forth in this complaint as if fully set forth herein.

61. The Board is a public body, subject to Arizona's Open Meetings Law. A.R.S. § 38-431. When the Board, or the Committee that selects the Board, enters an executive session, it must provide conspicuous public notice of the executive session and either record or take written minutes of the meeting. A.R.S. § 38-431.01(B). Notice of an executive session must be provided to the members of the public body and the general public at least twenty-four hours in advance. A.R.S.

38-431.01(B) and (C). It must include “a general description of the matters to be considered” and must “provide more than just a recital of the statutory provisions authorizing the executive session[.]” A.R.S. § 38-431(I).

62. Initiation of an executive session requires “a public majority vote of the members constituting a quorum[.]” Among other purposes, “a public body may hold an executive session. . .[for] “[d]iscussion or consideration of. . .appointment. . .of a public officer, appointee or employee of any public body[.]” A.R.S. § 38-431.02(A)(1). However, “with the exception of salary discussions, an officer, appointee or employee may demand that the discussion or consideration occur at a public meeting.” *Id.* To facilitate this right, the public body must provide at least twenty-four hours written notice to the appointee of the body’s intent to go in executive session, so that he or she may “determine whether the discussion or consideration should occur at a public meeting.” *Id.* This personal written notice to the appointee is specific notice to the appointee and is different from the requirement to provide notice to the general public. *Id.*

63. Any violation of the Open Meetings Law renders **all legal actions taken therein null and void** unless, within thirty days of the violation (or when the body reasonably should have known of the violation), they are ratified at a public meeting noticed by “a description of the action to be ratified, a clear statement that the public body proposes to ratify a prior action and information on

how the public may obtain a detailed written description of the action to be ratified.” § 38-431.05. Further, “a detailed written description of the action to be ratified and all deliberations, consultations and decisions by members of the public body that preceded and related to such action” shall be made available to the public and “shall also be included as part of the minutes of the meeting at which ratification is taken.” *Id.* This must be made available at least seventy-two hours prior to the ratification meeting. *Id.*

64. Arizona law strongly favors open meetings. Defendants violated Arizona’s Open Meetings Law in numerous, non-technical respects pursuant to state law. See Attachments E,F,G,I. The interviews of clemency board applicants, such as Ms. Stenson and Ms Wilkens, as to specific cases that may come before the board in the future, Attachments F and G, are violations of the Open Meetings Law. The numerous “come to Jesus” meetings initiated by Defendant Smith on behalf of Defendant Governor Brewer, in which Defendant Smith sought to influence the vote of the Board constituted an improper open meeting. Attachments H, I. The discussion between three members of the Board respecting how they would vote on Mr. Schad’s application is a violation of the Open Meetings law. Attachment I.

65. Each of these actions violated Arizona’s Open Meeting Laws. *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 485, 803 P.2d 891, 896 (Ariz.

1990)(“members of a public body may meet in executive session for discussion with attorneys. . . . However, once the members. . .commence any discussion regarding. . .what action to take based upon the attorney's advice, the discussion moves beyond the realm of legal advice and must be open to the public.”); *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 124, 912 P.2d 1345, 1353 (App.I 1995)(“It is the debate over what action to take, including the pros and cons and policy implications, of competing alternative courses of action, that must take place in public.”).

66. Most serious for Plaintiff is the fact that two of the current, sitting Board Members have already unequivocally stated in the presence of each other (and at the time another voting member of the Board) that they would not vote in favor of Plaintiff, even before hearing his case. It should be noted that Plaintiff’s commutation request was supported by numerous institutional records demonstrating 35 years of pristine behavior and the declarations of two corrections officers who know Plaintiff and who unequivocally state that he is a model prisoner. Further, the State has not presented any written opposition to the Board and the victim’s family members have been silent as to their preference since the beginning of this case.

### **CLAIM THREE**

**DEFENDANTS CONSPIRED UNDER COLOR OF STATE LAW TO DEPRIVE HIGH PROFILE ARIZONA INMATES ACCESS TO EXECUTIVE CLEMENCY IN VIOLATION OF THE EQUAL PROTECTION CLAUS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHICH, IN A DEATH PENALTY CASE, ALSO VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION. (42 U.S.C. § 1985)**

67. Plaintiff incorporates by reference each and every statement and allegation set forth in this complaint as if fully set forth herein.

68. Defendants acting together have conspired to deprive high-profile inmates, including death row inmates, access to executive clemency in violation of the equal protection of the law.

69. Plaintiff is a high-profile inmate by virtue of his sentence of death. As such he is a member of a class of inmates that Defendants have conspired to deprive him, and have deprived him, of the equal protection of the laws.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for:

(1) Temporary, preliminary, and permanent injunctive relief to enjoin Defendants from convening as the Arizona Board of Executive Clemency to consider Petitions for Executive Clemency that will be filed by the Plaintiffs due to the above-described violations of Plaintiff's rights to due process of law and to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

(2) Temporary, preliminary, and permanent injunctive relief to enjoin the Arizona Board of Executive Clemency from convening, even if constituted with other members, until a legally-constituted, legally-performing, conflict-

free, and independent Board may be empanelled to fully and fairly consider Plaintiff's Petition for Executive Clemency.

(3) A declaratory judgment that undue pressure placed on the Board by the Governor and her intermediaries renders the Defendants unable to perform their quasijudicial duties fairly and impartially and their convening to consider Plaintiff's Petition for Executive Clemency would violate Plaintiff's rights under the Eighth and Fourteenth Amendments to the United States Constitution.

(4) Appropriate and necessary discovery and an evidentiary hearing to permit Plaintiff to prove his constitutional claims;

(5) Reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and the laws of the United States;

(6) Costs of the suit; and

(7) Any such other relief as the Court deems just and proper.

Respectfully submitted this 26<sup>th</sup> day of September, 2013.

Kelley J. Henry  
Supervisory Asst. Federal Public Defender  
Denise Young, Esq.

By s/Kelley J. Henry  
Counsel for Plaintiff Edward Schad



# Certificate of Service

I hereby certify that on September 26, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona. I also certify that I emailed a copy of the same to Defendants and their counsel, Kelly Gibson as well as to Mr. Jeffrey Zick and Mr. Jon Anderson, Assistant Attorneys General. I further certify that I emailed copies to Ms. Kristine Fox, Capital Case Staff Attorney for the District of Arizona and Ms. Margaret Epler, Capital Case Staff Attorney for the Sixth Circuit. I further certify that I have caused copies of this complaint to be delivered via priority overnight mail to the defendant's at their place of business.

Kelley J Henry  
Counsel for Edward Schadt

OFFICE OF THE  
**FEDERAL PUBLIC DEFENDER**  
**MIDDLE DISTRICT OF TENNESSEE**

**HENRY A. MARTIN**  
**FEDERAL PUBLIC DEFENDER**

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NASHVILLE, TENNESSEE 37203-3805  
TELEPHONE: 615-736-5047  
FAX: 615-736-5265

September 23, 2013

Mr. Brian Livingston  
Mr. John "Jack" LaSota  
Ms. Ellen Kirschbaum  
Ms. Donna Harris  
1645 W. Jefferson  
Suite 101  
Phoenix, AZ 85007

*Via Facsimile and Email*

Re: Edward Schad Request for Sentence Commutation and Executive Clemency

Dear Members of the Arizona Board of Executive Clemency,

On behalf of Mr. Schad, I write to request that each of you recuse yourself from the upcoming, October 2, 2013 hearing. The reason for this request is that I have recently received information that I believe reveals that Mr. Schad cannot currently obtain a full and fair clemency hearing that comports with principles of federal due process before this board. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).

With respect to Mr. Livingston and Ms. Kirschbaum, I have been informed that a witness has indicated that Mr. Livingston and Ms. Kirschbaum, and possibly others, engaged in an informal conversation wherein each specifically opined that he or she would never recommend clemency for Mr. Schad and expressed concern about what the Governor might think of such a recommendation. It is alleged that this conversation took place shortly after the previous hearing for Mr. Schad was cancelled either in late February or early March, 2013. Such a conversation violates the Arizona open meetings law, A.R.S. § 38-431.04, and evidences a specific bias on the part of Mr. Livingston and Ms. Kirschbaum against Mr. Schad denying him of fundamental due process. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).

With respect to Ms. Harris, Ms. Harris has only recently been appointed to the Board and as such cannot comply with the training requirements necessary to sit as a voting member of the Board at Mr. Schad's upcoming scheduled clemency hearing. A.R.S. § 31-401.

With respect to all Board Members, I have been informed that the Governor's office has in the past sent letters addressed to Board Members expressing displeasure with certain board members votes in favor of clemency. It has also been alleged that certain Board Members have been summoned to

September 25, 2013

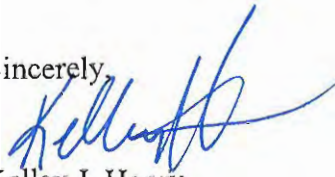
Page 2 of 2

meetings with members of the Governor's staff to express displeasure with board member votes. This attempt to influence the outcome of clemency procedures by members of the Governor's staff undermines the fairness and impartiality of the Board's hearings, promotes bias against an applicant, and deprives Mr. Schad of fundamental due process at any hearing. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).

Accordingly, I ask each of you to recuse yourself from Mr. Schad's hearing. As time is of the essence, I request a written response by close of business, Wednesday, September 25, 2013. Response via email or facsimile is acceptable. My email address is [kelly\\_henry@fd.org](mailto:kelly_henry@fd.org). My facsimile number is (615) 736-5265.

Thank you for your immediate attention.


Sincerely,



Kelley J. Henry

Supervisory Asst. Federal Public Defender



**RE: Edward Schad #40496**   
**Kelley Henry** to: Daisy Kirkpatrick  
Cc: dyoung3  
Bcc: Dale Baich, Tim Gabrielsen

09/23/2013 01:21 PM

Ms. Kirkpatrick,

Please deliver the attached letter to each member of the Board. Thank you.



SKMB\_C652 C13092313140.pdf

Kelley J. Henry  
Supervisory AFD - Capital Habeas  
810 Broadway, Suite 200  
Nashville, TN 37203  
(615) 695-6906 (direct)  
(615) 337-0469 (cell)

\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE SEP-23-2013 \*\*\*\*\* TIME 13:04 \*\*\*\*\*

MODE = MEMORY TRANSMISSION

START=SEP-23 13:03

END=SEP-23 13:04

FILE NO.=902

STN NO.	COMM.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
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-FEDERAL PUBLIC DEFENDER -

\*\*\*\*\* KM-F1060 \*\*\*\*\* - \*\*\*\*\* - 615 736 5265- \*\*\*\*\*

OFFICE OF THE  
**FEDERAL PUBLIC DEFENDER**  
**MIDDLE DISTRICT OF TENNESSEE**

HENRY A. MARTIN  
 FEDERAL PUBLIC DEFENDER

810 BROADWAY, SUITE 200  
 NASHVILLE, TENNESSEE 37203-3805  
 TELEPHONE: 615-736-5047  
 FAX: 615-736-5265

September 23, 2013

Mr. Brian Livingston  
 Mr. John "Jack" LaSota  
 Ms. Ellen Kirschbaum  
 Ms. Donna Harris  
 1645 W. Jefferson  
 Suite 101  
 Phoenix, AZ 85007

Via Facsimile and Email

Re: Edward Schad Request for Sentence Commutation and Executive Clemency

Dear Members of the Arizona Board of Executive Clemency,

On behalf of Mr. Schad, I write to request that each of you recuse yourself from the upcoming, October 2, 2013 hearing. The reason for this request is that I have recently received information that I believe reveals that Mr. Schad cannot currently obtain a full and fair clemency hearing that comports with principles of federal due process before this board. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).

With respect to Mr. Livingston and Ms. Kirschbaum, I have been informed that a witness has indicated that Mr. Livingston and Ms. Kirschbaum, and possibly others, engaged in an informal conversation wherein each specifically opined that he or she would never recommend clemency for Mr. Schad and expressed concern about what the Governor might think of such a recommendation. It is alleged that this conversation took place shortly after the previous hearing for Mr. Schad was cancelled either in late February or early March, 2013. Such a conversation violates the Arizona open meetings law, A.R.S. § 38-431.04, and evidences a specific bias on the part of Mr. Livingston and Ms. Kirschbaum against Mr. Schad denying him of fundamental due process. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).

With respect to Ms. Harris, Ms. Harris has only recently been appointed to the Board and as such cannot comply with the training requirements necessary to sit as a voting member of the Board at Mr. Schad's upcoming scheduled clemency hearing. A.R.S. § 31-401.

With respect to all Board Members, I have been informed that the Governor's office has in the past sent letters addressed to Board Members expressing displeasure with certain board members votes in favor of clemency. It has also been alleged that certain Board Members have been summoned to

Kelley J. Henry

Federal Public Defender's Office

Fax: 615-736-5265

I read your September 23 request that I recuse myself from participating in an upcoming clemency hearing for Mr. Edward Schad. I will not do as you ask.

Your allegation that the Arizona Governor's Office has sent me one or more letters "expressing displeasure with certain board members['] votes in favor of clemency" is totally untrue. I have never been "summoned" to a meeting with any member of the Governor's staff for such person "to express displeasure with board member votes." I am not aware of any such summons to a "regular" board member.

Incidentally, I have never understood that a conversation between two members of a five-person public board about an officially-relevant topic, without more, violates the Arizona Open Meetings Law.

John A. LaSota Jr.

REPRIEVE/COMMUTATION OF SENTENCE  
HEARING ATTENDANCE FORM

I, Edward Schad, ADC# 40496, have a scheduled execution date of March 6, 2013

RE: State vs. Schad, Yavapai County Superior Court Number CR-8752

CHECK ONE:

☒ I will attend my reprieve/commutation of sentence hearing scheduled for  
February 27, 2013 at ASPCE-Rynning at 8:30 a.m..

☐ I do not wish to attend my reprieve/commutation of sentence hearing scheduled for  
February 27, 2013 at ASPCE-Rynning at 8:30 a.m.

Inmate Signature

Edward Schad

Date 01-31-13

Witness Signature

Alvin Young

Date 1-31-13

TO: The Arizona Board of Executive Clemency

FROM: Kelley Henry and Denise Young  
on Behalf of Edward H. Schad, Inmate Number 40496

DATE: February 22, 2013

RE: Request for Reprieve and Commutation of Sentence

Dear Members of the Board:

Edward Schad's unprecedented extraordinary conduct while incarcerated entitles him to a commutation of his sentence to life in prison; the same sentence that was offered to him by the prosecutor prior to trial. See exhibits 1-28. In over three decades of incarceration, Mr. Schad has never received any disciplinary actions of any kind, and exhibits an extraordinary work ethic. His disciplinary record is unprecedented. While incarcerated he has been a conscientious worker who bettered the prison environment. See Exhibits 1-7. While he was allowed, he sought to further his education and he excelled. See Exhibits 9-17. He has illustrated a children's book. Exhibit 18. He turned his life to God and joined the Lutheran Church. Exhibits 18-28.

The central importance of the prosecutor's life sentence offer to Schad cannot be overstated: had the county attorney believed a death sentence based on the facts of the crime and Schad's actions was required, he would not have offered Schad a life sentence. The county attorney's life offer was appropriate, justified and unsurprising, given Schad's unblemished prison record, and the support of correctional officers as to Schad's trustworthiness and good character. Indeed Schad has continued to demonstrate his good



character and trustworthiness during his 34 years on Arizona's death row – more than he would have served had he taken the life offer. As one corrections officer who supervised Schad at the Florence prison complex explained:

I was a maintenance supervisor at Florence State Prison for nine and a half years. I worked at CB6 for close to eight years during the 1990s.

Ed Schad was assigned to me as one of four full time workers assigned to me. He worked for me for approximately seven years. I used him more than other inmates because he was easy to get along with, he never gave anyone any trouble and he [was] always cheerful about completing any tasks I asked him to do. He was a good worker, and he came up with some good ideas on how to do things better. He never gave the guards a hard time, was a willing worker, and conscientious about the prison rules.

Ronald Labrecque Declaration, Ex. 1.

Mr. Schad would be a good candidate for the open yard or population. He has never caused any problems, and has never had any infraction that I am aware of.

Correctional officer, Gabriel Lagunas, agreed, declaring:

I have worked at the Arizona State Prison at Florence, Arizona for 24 years. I have known Ed Schad since 1990. I started as a correctional officer and am now a sergeant.

Mr. Schad would be very quiet and mellow. He never caused any problems for anybody. I knew Mr. Schad at CB6 and then at the Browning Unit. Mr. Schad was very cooperative and respectful of the prison rules.

Mr. Schad would be a good candidate for the open yard or general population. He has never caused any problems, and has never had an infraction that I am aware of. There are quite a few inmates there that I wouldn't trust, but Mr. Schad is not one of them.

Declaration, Ex. 2.

These officers echo the testimony that was presented at Schad's sentencing hearing. For example, Stephen Love, a retired agent of the Utah Department of

Correction who had met Schad following his Utah incarceration for an accidental death that occurred during consensual sodomy. R.T. 8-22-85, p. 34. Love testified at Schad's capital trial that he knew the facts supporting Mr. Schad's incarceration and based on those facts, and his interaction with and knowledge of Schad, he recommended Schad be paroled. *Id.*, p. 35. John Powers, a social worker and management auditor at the Utah prison, also knew Schad and testified he was a "model prisoner" throughout his incarceration. Then well-known Arizona psychiatrist Otto Bendheim interviewed Schad, and based on that interview, testified that although Schad's childhood was "miserable," he "has been an exemplary prisoner" and "made an honest attempt to rehabilitate himself in prison..." *Id.*, pp. 48-49, 51. After listening to this, and other testimony, the trial judge found in mitigation: Schad is "a personable, helpful prisoner who causes no problems," a "model prisoner" throughout his Utah and Arizona incarcerations, and in the Yavapai County jail, a "student and religious man," "trustworthy," "helpful, charitable," a reliable inmate who "possess[es] a good stable character," "proven to be a good worker," who has considerable friends and supporters for whom he cares for and who care for him, "accepted into the Lutheran Church," and who suffered no drug or alcohol problems. R.T. 8-29-85, pp. 7-8.

That was not all. Then Chairman of the Arizona Board of Pardons and Parole, Dick Ortiz, testified on Schad's behalf at his sentencing. Ortiz knew Schad and the facts of his case well. He had reviewed it during his work as a board member, and knew that the Yavapai County attorney had offered Schad a life sentence. Ortiz was "troubled" by the case, stating:

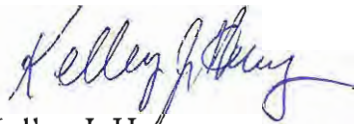
During [a previous hearing under warrant] and in the commutation phase, I believe I asked your client whether or not a plea agreement had been offered. His response at that time was yes, it had been. That concerned me somewhat. Because if a person, while maintaining innocence throughout and in exercising his constitutional right to a constitutional right to a jury trial, is found guilty and sentenced to death, after being offered a plea agreement, I find that to be somewhat disturbing.

R.T. 8-22-85, pp. 69-71, 75.

Mr. Schad has more than paid for the crime for which he was convicted. No purpose will be served by his execution. A commutation will send a powerful message encouraging inmates to comport themselves with honor and dignity and with an eye toward rehabilitation.

Mr. Schad will address the Board personally and explain to the Board why he is entitled to a sentence commutation. We appreciate the opportunity to address the Board in person.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Kelley J. Henry".

Kelley J. Henry  
Denise I. Young  
On Behalf of Edward H. Schad

## Declaration of Ronald Labrecque

I am an adult resident of Pinal County, Arizona.

I was a maintenance supervisor at Florence State Prison for nine and a half years. I worked at CBlc for close to eight years during the 1990s.

Ed Schad was assigned to me as one of four full time workers assigned to me. He worked for me for approximately seven years. I used him more than the other inmates assigned to me because he was easy to get along with, he never gave anybody any trouble and he always cheerful about completing any tasks I asked him to do. He was a good worker, and came up with some good ideas on how to do things better. He never gave the guards a hard time, was a willing worker, and conscientious about the prison rules.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Ronald Labrecque 12-11-92



## Declaration of Gabriel Lagunas

I am an adult resident of Pinal County, Arizona. My name is Gabriel Lagunas.

I have worked at the Arizona State Prison at Florence, Arizona for 24 years. I have known Ed Schad since 1990. I started as a correctional officer and am now a sergeant.

Mr. Schad was very quiet and mellow. He never caused any problems for anybody. I knew Mr. Schad at CB6 and then at the Browning Unit. Mr. Schad was very cooperative and respectful of the prison rules.

Mr. Schad would be a good candidate for the open yard or general population. He has never caused any problems, and has never had an infraction that I am aware of. There are quite a few inmates there that I wouldn't trust, but Mr. Schad is not one of them.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Gabriel T. Lagunas  
02/11/12

INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION Mo. \_\_\_\_\_ Yr. \_\_\_\_\_

NAME Schad ADC# 40476 INSTITUTION ADFC-F

ASSIGNMENT Special Paint Crew [ ] PRIMARY [ ] SECONDARY

COMMENTS: SCHAD IS VERY HANDY W/PAINT PUTS OUT A LOT OF EFFORT & COOPERATION

1. Unacceptable
2. Poor
3. Average
4. Good
5. Excellent

1 2 3 4 5 Effort	Hours this month <u>23.5</u>
1 2 3 4 5 Responsibility	
1 2 3 4 5 Cooperation	
<u>15</u> TOTAL	

Supervisor Signature \_\_\_\_\_ Inmate Signature \_\_\_\_\_

[ ] Inmate Agrees [ ] Disagrees [ ] Request Review

DISTRIBUTION: White: Master Record File Pink: Institution File Yellow: Inmate

FORM 40000020 Rev. 8

NAME Schad ADOC # 40476 INSTITUTION ADFC-F CB-6

DISTRIBUTION: White, Master Record File; Pink, Institution File; Yellow, Inmate

ASSIGNMENT: Spec. Paint Crew PRIMARY ☒ SECONDARY ☐

COMMENTS: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Hours this Month 11.5

1 2 3 4 5 Effort	Supervisor Signature _____	Resident Signature _____
1 2 3 4 5 Responsibility		
1 2 3 4 5 Cooperation		
<u>15</u> TOTAL	Resident Agrees <input type="checkbox"/> Disagree: <input type="checkbox"/> Requests Review <input type="checkbox"/>	

ADOC C-1 11-78 RESIDENT MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION Mo. 8 Yr. 90



DISTRIBUTION: White, Master Record File; Pink, Institution File; Yellow, Inmate

ASSIGNMENT: Paint Crew

PRIMARY ☒ SECONDARY ☐

1. Unacceptable
2. Poor
3. Average
4. Good
5. Excellent

COMMENTS: HE IS A FREQUENT WORKER AND HAS A GOOD KNOWLEDGE OF HIS JOB ASSIGNMENTS

Hours this Month 31.5

- |   |   |   |   |   |                |
|---|---|---|---|---|----------------|
| 1 | 2 | 3 | 4 | 5 | Effort         |
| 1 | 2 | 3 | 4 | 5 | Responsibility |
| 1 | 2 | 3 | 4 | 5 | Cooperation    |

15 TOTAL

ESD at Task 4706 1

Supervisor Signature

Resident Signature

Resident Agrees ☐ Disagrees ☐ Requests Review ☐

ADOC C-1 11-78 RESIDENT MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION

Mo. 11 Yr. 90

NAME Schad

ADOC # 40496

INSTITUTION

ASPC-P CR-6

DISTRIBUTION: White, Master Record File; Pink, Institution File; Yellow, Inmate

ASSIGNMENT: Paint Crew

PRIMARY ☒ SECONDARY ☐

1. Unacceptable
2. Poor
3. Average
4. Good
5. Excellent

COMMENTS: HE HAS A GOOD WORKING KNOWLEDGE OF HIS JOB ASSIGNMENT WORKS WELL WITH OTHERS HE HAS A VERY LITTLE SUPERVISION

Hours this Month 36

- |   |   |   |   |   |                |
|---|---|---|---|---|----------------|
| 1 | 2 | 3 | 4 | 5 | Effort         |
| 1 | 2 | 3 | 4 | 5 | Responsibility |
| 1 | 2 | 3 | 4 | 5 | Cooperation    |

15 TOTAL

ESD at Task 4706 1

Supervisor Signature

Resident Signature

Resident Agrees ☐ Disagrees ☐ Requests Review ☐

ADOC C-1 11-78 RESIDENT MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION

Mo. 12 Yr. 90

NAME SCHEIDT ADC# 40496 INSTITUTION CB-6

ASSIGNMENT Paint Crew [ ☒ ] PRIMARY [ ] SECONDARY

- 1. Unacceptable
- 2. Poor
- 3. Average
- 4. Good
- 5. Excellent

COMMENTS: very hard worker, always been  
what needs to be done

1	2	3	4	5	Effort
1	2	3	4	5	Responsibility
1	2	3	4	5	Cooperation
<div style="border: 1px solid black; padding: 2px; display: inline-block;">15</div>					TOTAL

Hours this month \_\_\_\_\_

Ron Labrecque Richard W. Schlad  
 Supervisor Signature Inmate Signature

[ ☒ ] Inmate Agrees [ ] Disagrees [ ] Request Review

DISTRIBUTION: White: Master Record File Pink: Institution File Yellow: Inmate

FORM 40000020

Rev. 8/87



NAME Schad ADC# 40496 INSTITUTION CB6  
 ASSIGNMENT Painter [ ] PRIMARY [ ] SECONDARY  
 COMMENTS: always eager to do a good job

1. Unacceptable
2. Poor
3. Average
4. Good
5. Excellent

1	2	3	4	5	Effort
1	2	3	4	5	Responsibility
1	2	3	4	5	Cooperation
<u>15</u>					TOTAL

Hours this month 108  
Ron Labrecque Supervisor Signature Edward H. Schad Inmate Signature  
 [ ] Inmate Agrees [ ] Disagrees [ ] Request Review

DISTRIBUTION: White: Master Record File Pink: Institution File Yellow: Inmate  
 FORM 40000020 Rev. 8/87

INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION

Mo. 5 Yr. 72

NAME Schad ADC# 40496 INSTITUTION CB6  
 ASSIGNMENT Painter [ ] PRIMARY [ ] SECONDARY  
 COMMENTS: Very skilled, concious worker

1. Unacceptable
2. Poor
3. Average
4. Good
5. Excellent

1	2	3	4	5	Effort
1	2	3	4	5	Responsibility
1	2	3	4	5	Cooperation
<u>15</u>					TOTAL

Hours this month 138  
Edward H. Schad Supervisor Signature Edward H. Schad Inmate Signature  
 [ ] Inmate Agrees [ ] Disagrees [ ] Request Review

DISTRIBUTION: White: Master Record File Pink: Institution File Yellow: Inmate  
 FORM 40000020 Rev. 8/87

INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION

Mo. 6 Yr. 72

NAME Schad ADC# 40496 INSTITUTION CB6  
 ASSIGNMENT Paint Crew [ ] PRIMARY [ ] SECONDARY  
 COMMENTS: excellent worker

1. Unacceptable
2. Poor
3. Average
4. Good
5. Excellent

1	2	3	4	5	Effort
1	2	3	4	5	Responsibility
1	2	3	4	5	Cooperation
<u>15</u>					TOTAL

Hours this month 131  
Ron Labrecque Supervisor Signature Edward H. Schad Inmate Signature  
 [ ] Inmate Agrees [ ] Disagrees [ ] Request Review

DISTRIBUTION: White: Master Record File Pink: Institution File Yellow: Inmate  
 FORM 40000020 Rev. 8/87



NAME Schad ADC# 40496 INSTITUTION CR6

ASSIGNMENT Painter [ ] PRIMARY [ ] SECONDARY

COMMENTS: excellent worker

1. Unacceptable
2. Poor
3. Average
4. Good
5. Excellent

1 2 3 4 5 Effort
1 2 3 4 5 Responsibility
1 2 3 4 5 Cooperation
<u>15</u> TOTAL

Hours this month 87

Ron Labrecque Supervisor Signature Edward Schad Inmate Signature

[ ] Inmate Agrees [ ] Disagrees [ ] Request Review

DISTRIBUTION: White - Master Record File Pink: Institution File Yellow: Inmate

FORM 40000020 Rev. 8/87

NAME Schad ADC# 40496 INSTITUTION ASPC-E CR-6

ASSIGNMENT Special Paint crew Code 32.00 [ ] PRIMARY [ ] SECONDARY

COMMENTS: EXCELLENT WORKER WORKS WELL WITH ALL OTHER PAINT CREWMATES WORKS GREAT ON ALL ASSIGNED PROJECTS VERY SKILLED WORKER

1. Unacceptable
2. Poor
3. Average
4. Good
5. Excellent

1 2 3 4 5 Effort
1 2 3 4 5 Responsibility
1 2 3 4 5 Cooperation
<u>15</u> TOTAL

Hours this month 117 Month Sept. Year 92

Shirley Satter 4423 Supervisor Signature Edward Schad Inmate Signature

[ ] Resident Agrees [ ] Disagrees [ ] Requests Review

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INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION



ASSIGNMENT MAINTENANCE/GENERAL [ ] PRIMARY [ ] SECONDARY

1. Unacceptable
2. Poor
3. Average
4. Good
5. Excellent

COMMENTS: Excellent worker

Hours this month 20 Month JUNE Year 1993

- |   |   |   |   |   |                |
|---|---|---|---|---|----------------|
| 1 | 2 | 3 | 4 | 5 | Effort         |
| 1 | 2 | 3 | 4 | 5 | Responsibility |
| 1 | 2 | 3 | 4 | 5 | Cooperation    |

Supervisor Signature Roy Labrecque

Inmate Signature Ed Schad

[ ] Resident Agrees [ ] Disagrees [ ] Requests Review

Distribution: White - AIMS Unit Canary - Inmate

Form 40000020  
Rev. 06/06/89

INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION

NAME Schad, E. ADC# 40496 INSTITUTION CB6

ASSIGNMENT Spec. Project 90.91 [X] PRIMARY [ ] SECONDARY

1. Unacceptable
2. Poor
3. Average
4. Good
5. Excellent

COMMENTS: Excellent worker

Hours this month 956.50 Month 7 Year 93

- |   |   |   |   |   |                |
|---|---|---|---|---|----------------|
| 1 | 2 | 3 | 4 | 5 | Effort         |
| 1 | 2 | 3 | 4 | 5 | Responsibility |
| 1 | 2 | 3 | 4 | 5 | Cooperation    |

Supervisor Signature Roy Labrecque

Inmate Signature Ed Schad

[ ] Resident Agrees [ ] Disagrees [ ] Requests Review

Distribution: White - AIMS Unit Canary - Inmate

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Rev. 06/06/89

INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION

NAME Schad, E. ADC# 40496 INSTITUTION CB6

ASSIGNMENT 90.91 [X] PRIMARY [ ] SECONDARY

1. Unacceptable
2. Poor
3. Average
4. Good
5. Excellent

COMMENTS: Excellent worker

Hours this month 876.50 Month Aug Year 93

- |   |   |   |   |   |                |
|---|---|---|---|---|----------------|
| 1 | 2 | 3 | 4 | 5 | Effort         |
| 1 | 2 | 3 | 4 | 5 | Responsibility |
| 1 | 2 | 3 | 4 | 5 | Cooperation    |

Supervisor Signature Roy Labrecque

Inmate Signature Ed Schad

[ ] Resident Agrees [ ] Disagrees [ ] Requests Review

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INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION



ASSIGNMENT 90.91 ☒ PRIMARY ☐ SECONDARY

COMMENTS: Does excellent work

1. Unacceptable  
2. Poor  
3. Average  
4. Good  
5. Excellent

Hours this month 756.50 Month Sept Year 93

1 2 3 4 5 Effort  
1 2 3 4 5 Responsibility  
1 2 3 4 5 Cooperation

15 TOTAL

Supervisor Signature Ron Labrecque Inmate Signature Edward H. Schad

☐ Resident Agrees ☐ Disagrees ☐ Requests Review

Distribution: White - AIMS Unit Canary - Inmate

Form 40000020  
Rev. 06/06/89

**INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION**

NAME Schad, E ADC# 40496 INSTITUTION CB6

ASSIGNMENT 90.91 ☒ PRIMARY ☐ SECONDARY

COMMENTS: Does excellent work

1. Unacceptable  
2. Poor  
3. Average  
4. Good  
5. Excellent

Hours this month 896.50 Month Oct Year 93

1 2 3 4 5 Effort  
1 2 3 4 5 Responsibility  
1 2 3 4 5 Cooperation

15 TOTAL

Supervisor Signature Ron Labrecque Inmate Signature Edward H. Schad

☐ Resident Agrees ☐ Disagrees ☐ Requests Review

Distribution: White - AIMS Unit Canary - Inmate

Form 40000020  
Rev. 06/06/89

**INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION**

**INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION** Mo. Nov Yr. 93

NAME Schad, E ADC# 40496 INSTITUTION CB6

ASSIGNMENT 90.91 ☒ PRIMARY ☐ SECONDARY

COMMENTS: Always does excellent work

1. Unacceptable  
2. Poor  
3. Average  
4. Good  
5. Excellent

Hours this month \_\_\_\_\_

1 2 3 4 5 Effort  
1 2 3 4 5 Responsibility  
1 2 3 4 5 Cooperation

15 TOTAL

Supervisor Signature Ron Labrecque Inmate Signature Edward H. Schad

☐ Inmate Agrees ☐ Disagrees ☐ Request Review

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FORM 40000020 Rev. 8/87

NAME Case 2:13-cv-01162-ROS Document 1-3 Filed 09/26/13 Page 15 of 70 389 (69 of 408)ASSIGNMENT 90.91☒ PRIMARY ☐ SECONDARY

COMMENTS:

Always does excellent work

1. Unacceptable
2. Poor
3. Average
4. Good
5. Excellent

1 2 3 4 5 Effort

1 2 3 4 5 Responsibility

1 2 3 4 5 Cooperation

TOTAL

Hours this month

Supervisor Signature

Inmate Signature

☒ Inmate Agrees ☐ Disagrees ☐ Request Review

DISTRIBUTION: White: Master Record File Pink: Institution File Yellow: Inmate

FORM 40000020

Rev. 8/87



ASSIGNMENT Special Project (9091) ☒ PRIMARY ☐ SECONDARY

COMMENTS: Does excellent work

- 1. Unacceptable
- 2. Poor
- 3. Average
- 4. Good
- 5. Excellent

Hours this month \_\_\_\_\_ Month 11 Year 98

- 1 2 3 4 5 Effort
- 1 2 3 4 5 Responsibility
- 1 2 3 4 5 Cooperation

Roy Labrecque Supervisor Signature Edward H. J. J. J. Inmate Signature

☒ Resident Agrees ☐ Disagrees ☐ Requests Review

15 TOTAL

Distribution: White - AIMS Unit Canary - Inmate

INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION

Form 400000020  
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ASSIGNMENT \_\_\_\_\_ [ ] PRIMARY [ ] SECONDARY

COMMENTS: \_\_\_\_\_

1. Unacceptable  
2. Poor  
3. Average  
4. Good  
5. Excellent

Hours this month \_\_\_\_\_ Month \_\_\_\_\_ Year \_\_\_\_\_

1 2 3 4 5 Effort  
1 2 3 4 5 Responsibility  
1 2 3 4 5 Cooperation

Supervisor Signature \_\_\_\_\_ Inmate Signature \_\_\_\_\_

[ ] Resident Agrees [ ] Disagrees [ ] Requests Review

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Rev. 06/06/89

**INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION**

NAME \_\_\_\_\_ ADC# \_\_\_\_\_ INSTITUTION \_\_\_\_\_

ASSIGNMENT \_\_\_\_\_ [ ] PRIMARY [ ] SECONDARY

COMMENTS: \_\_\_\_\_

1. Unacceptable  
2. Poor  
3. Average  
4. Good  
5. Excellent

Hours this month \_\_\_\_\_ Month \_\_\_\_\_ Year \_\_\_\_\_

1 2 3 4 5 Effort  
1 2 3 4 5 Responsibility  
1 2 3 4 5 Cooperation

Supervisor Signature \_\_\_\_\_ Inmate Signature \_\_\_\_\_

[ ] Resident Agrees [ ] Disagrees [ ] Requests Review

Distribution: White - AIMS Unit Canary - Inmate

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Rev. 06/06/89

**INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION**

NAME \_\_\_\_\_ ADC# \_\_\_\_\_ INSTITUTION \_\_\_\_\_

ASSIGNMENT \_\_\_\_\_ [ ] PRIMARY [ ] SECONDARY

COMMENTS: \_\_\_\_\_

1. Unacceptable  
2. Poor  
3. Average  
4. Good  
5. Excellent

Hours this month \_\_\_\_\_ Month \_\_\_\_\_ Year \_\_\_\_\_

1 2 3 4 5 Effort  
1 2 3 4 5 Responsibility  
1 2 3 4 5 Cooperation

Supervisor Signature \_\_\_\_\_ Inmate Signature \_\_\_\_\_

[ ] Resident Agrees [ ] Disagrees [ ] Requests Review

Distribution: White - AIMS Unit Canary - Inmate

Form 40000020  
Rev. 06/06/89

**INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION**



Inmate Name: Schad, E. ADC#: 40496 Institution: ASPC - F CB #6  
 Duty Assignment: Special Projects Pay: .50 ☒ Primary ☐ Secondary  
 Month: 04 Year: 95 Hours this Month: 186.0

1. Never
2. Seldom
3. Sometimes
4. Usually
5. Always

## CRITERIA:

## EFFORT:

Remains busy and constructive during work hours. Completes tasks in a timely and thorough manner.

## RESPONSIBILITY:

Reports on time and properly dressed. Works well when not being directly supervised.

## COOPERATION:

Cooperates with staff and works well with other inmates. Follows instructions without argument.

COMMENTS:

Always does excellent work

INMATE ☒ Agrees ☐ Disagrees ☐ Requests Review

Ron Labrecque  
Supervisor Signature

Edward H. Schad  
Inmate Signature

Dist.: White - AIMS Unit  
Canary - Inmate

Form: 40000020

Rev. 01/04/93

## INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION

NAME Schad, E. ADC# 40496 INSTITUTION ASPC-F CB-6

ASSIGNMENT (90.91) Special Projects ☐ PRIMARY ☐ SECONDARY

COMMENTS:

Always does excellent work

1. Unacceptable
2. Poor
3. Average
4. Good
5. Excellent

Hours this month

Month

Year

- 1 2 3 4 5 Effort
- 1 2 3 4 5 Responsibility
- 1 2 3 4 5 Cooperation

TOTAL

15

Ron Labrecque  
Supervisor Signature

Edward Schad  
Inmate Signature

☒ Resident Agrees ☐ Disagrees ☐ Requests Review

Distribution: White - AIMS Unit Canary - Inmate

Form 40000020

Rev. 06/06/89

## INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION

Inmate Name: Schad, E. ADC#: 40596 Institution: ASPC - F- CB #6  
 Duty Assignment: Special Projects Pay: .50 ☒ Primary ☐ Secondary  
 Month: 05 Year: 95 Hours this Month: \_\_\_\_\_

1. Never
2. Seldom
3. Sometimes
4. Usually
5. Always

## CRITERIA:

## EFFORT:

Remains busy and constructive during work hours. Completes tasks in a timely and thorough manner.

## RESPONSIBILITY:

Reports on time and properly dressed. Works well when not being directly supervised.

## COOPERATION:

Cooperates with staff and works well with other inmates. Follows instructions without argument.

COMMENTS:

Always does excellent work

INMATE ☒ Agrees ☐ Disagrees ☐ Requests Review

Ron Labrecque  
Supervisor Signature

Edward H. Schad  
Inmate Signature

Dist.: White - AIMS Unit  
Canary - Inmate

Form: 40000

Rev. 01/04/93

## INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION



Inmate Name: Schad, E. Date: 06/30/1995  
Duty Assignment: Special Projects ADC#: 040496 Institution: ASPC F CB 6  
Month: 06 Year: 95 Hours this Month: 4 Pay: .50 ☒ Primary ☐ Secondary

<div>1. Never 2. Seldom 3. Sometimes 4. Usually 5. Always</div>	<b>CRITERIA:</b>	<b>EFFORT:</b>	Remains busy and constructive during work hours. Completes tasks in a timely and thorough manner.
		<b>RESPONSIBILITY:</b>	Reports on time and properly dressed. Works well when not being directly supervised.
		<b>COOPERATION:</b>	Cooperates with staff and works well with other inmates. Follows instructions without argument.
COMMENTS: <u>Always does excellent work</u>			
INMATE <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree <input type="checkbox"/> Requests Review			
<div>1 2 3 4 5 Effort 1 2 3 4 5 Responsibility 1 2 3 4 5 Cooperation <u>15</u> TOTAL</div>		<div><u>Ron Labrecque</u> <u>PSI</u> <u>Edmund N. Schad</u> Supervisor Signature Inmate Signature</div>	

Dist.: White - AIMS Unit  
Canary - Inmate

INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION Form: 40000020 Rev. 01/04/93

Date: 08/01/95

Inmate Name: Schad, E. ADC#: 040496 Institution: ASPC F CB 6  
Duty Assignment: Special Projects Pay: .50 ☐ Primary ☐ Secondary  
Month: 07 Year: 95 Hours this Month: 97.5

<div>1. Never 2. Seldom 3. Sometimes 4. Usually 5. Always</div>	<b>CRITERIA:</b>	<b>EFFORT:</b>	Remains busy and constructive during work hours. Completes tasks in a timely and thorough manner.
		<b>RESPONSIBILITY:</b>	Reports on time and properly dressed. Works well when not being directly supervised.
		<b>COOPERATION:</b>	Cooperates with staff and works well with other inmates. Follows instructions without argument.
COMMENTS: <u>always does excellent work</u>			
INMATE <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree <input type="checkbox"/> Requests Review			
<div>1 2 3 4 5 Effort 1 2 3 4 5 Responsibility 1 2 3 4 5 Cooperation <u>15</u> TOTAL</div>		<div><u>Ron Labrecque</u> <u>Edmund N. Schad</u> Supervisor Signature Inmate Signature</div>	

Dist.: White - AIMS Unit  
Canary - Inmate

INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION Form: 40000020 Rev. 01/04/93

Date: 08/28/95

Inmate Name: Schad, E. ADC#: 040496 Institution: ASPC F CB 6  
Duty Assignment: Special Projects Pay: .50 ☐ Primary ☐ Secondary  
Month: 08 Year: 95 Hours this Month: 71.5

<div>1. Never 2. Seldom 3. Sometimes 4. Usually 5. Always</div>	<b>CRITERIA:</b>	<b>EFFORT:</b>	Remains busy and constructive during work hours. Completes tasks in a timely and thorough manner.
		<b>RESPONSIBILITY:</b>	Reports on time and properly dressed. Works well when not being directly supervised.
		<b>COOPERATION:</b>	Cooperates with staff and works well with other inmates. Follows instructions without argument.
COMMENTS: <u>always does excellent work</u>			
INMATE <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree <input type="checkbox"/> Requests Review			
<div>1 2 3 4 5 Effort 1 2 3 4 5 Responsibility 1 2 3 4 5 Cooperation <u>15</u> TOTAL</div>		<div><u>Ron Labrecque</u> <u>Edmund N. Schad</u> Supervisor Signature Inmate Signature</div>	

Dist.: White - AIMS Unit  
Canary - Inmate



Inmate Name: Special Projects Date: 09/28/95  
 Duty Assignment: Special Projects ADC#: 50 Institution: ASP C 1 CB 8  
 Months: 09 Years: 95 Hours this Month: 13.0 Pay: .50 ( ) Primary ( ) Secondary

1. Never  
 2. Seldom  
 3. Sometimes  
 4. Usually  
 5. Always

## CRITERIA:

## EFFORT:

Remains busy and constructive during work hours. Completes tasks in a timely and thorough manner.

## RESPONSIBILITY:

Reports on time and properly dressed. Works well when not being directly supervised.

## COOPERATION:

Cooperates with staff and works well with other inmates. Follows instructions without argument.

COMMENTS: always does excellent work

1 2 3 4 5 Effort  
 1 2 3 4 5 Responsibility  
 1 2 3 4 5 Cooperation  
15 TOTAL

INMATE ( ) Agree ( ) Disagree ( ) Requests Review

Ron Labrecque

Supervisor Signature

Edward H. Schad

Inmate Signature

Dist.: White - AIMS Unit  
 Canary - Inmate

Form: 40000020

Rev. 01/04/93

## INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION

Inmate Name: Schad, E. Date: 10/31/95  
 Duty Assignment: Special Projects ADC#: 040496 Institution: ASP C 1 CB 6  
 Months: 10 Years: 95 Hours this Month: 25.0 Pay: .50 ( ) Primary ( ) Secondary

1. Never  
 2. Seldom  
 3. Sometimes  
 4. Usually  
 5. Always

## CRITERIA:

## EFFORT:

Remains busy and constructive during work hours. Completes tasks in a timely and thorough manner.

## RESPONSIBILITY:

Reports on time and properly dressed. Works well when not being directly supervised.

## COOPERATION:

Cooperates with staff and works well with other inmates. Follows instructions without argument.

COMMENTS: always does excellent work

1 2 3 4 5 Effort  
 1 2 3 4 5 Responsibility  
 1 2 3 4 5 Cooperation  
15 TOTAL

INMATE ( ) Agree ( ) Disagree ( ) Requests Review

Ron Labrecque

Supervisor Signature

Edward H. Schad

Inmate Signature

Dist.: White - AIMS Unit  
 Canary - Inmate

Form: 40000020

Rev. 01/04/93

## INMATE MONTHLY WORK/TRAINING/EDUCATION/TREATMENT EVALUATION

# Central Arizona College

A Unit of the Pinal County Junior College District



To all to whom these presents may come, Greetings:

Be it known that

**Edward Harold Schad**

having successfully completed the course of study as prescribed by this institution is hereby granted this

**Associate in Arts**

In witness whereof have been affixed the seal of the College and the signatures of its executive officers.

May 13, 1988

*Charles J. Cumming*  
Dean of College

*Chie H. McElynn*  
Registrar of College

*Walter Christensen*  
President, Governing Board

*Edward Schad*  
District President

WITH BONDS





CENTRAL  
ARIZONA  
COLLEGE

District Offices  
Cottonwood at Thunderbolt Road  
Cottonwood, Arizona 86206  
Phone: Area 902  
808-0241  
823-4141

Signal Peak Campus  
Westcott at Thunderbolt Road  
Cottonwood, Arizona 86206  
Phone: Area 902  
808-0241  
823-4141

Apache Junction Campus  
273 E. 175 Highway 80  
Apache Junction, Arizona 85209  
Phone: Area 902  
980-7261  
980-7277

Alhambra Campus  
Covington Road - Box Route 904 97  
Alhambra, Arizona 85202  
Phone: Area 902  
980-2254  
980-2864  
723-4300

Gila River Skill Center  
P.O. Box 329  
Buckhorn, Arizona 86001  
Phone: Area 902  
942-3440  
723-4302  
761-0711

Arizona State Prison Complex  
6136 Ave  
Florence, Arizona 85232  
Phone: Area 902  
886-4111

June 2, 1988

Mr. Edward Schad  
#40496  
CB1-A-9  
Arizona State Prison  
Florence, AZ. 85232

Dear Mr. Schad:

Congratulations on attaining the Associate of Arts' Degree from Central Arizona College. We were pleased to be able to confer this degree on June 1, 1988. It represents seven years of hard work under difficult conditions. You are to be commended for your educational efforts.

We look forward to having you with us in the fall academic session.

Sincerely,

William Flores,  
Executive Dean - ASPC/F

Q. David Gipp  
Coordinator - Student Services

Robert Chapman  
Coordinator - Academic Services

QDG ce



**CENTRAL  
ARIZONA  
COLLEGE**

Kathleen F. Arns, Ph. D.

President

June 8, 1989

District Offices  
Woodruff at Overfield Road  
Coolidge, Arizona 85226  
Phone: Area 602:  
836-8243  
723-4141

Edward Schad  
BOX B40496  
FLORENCE, AZ 85232

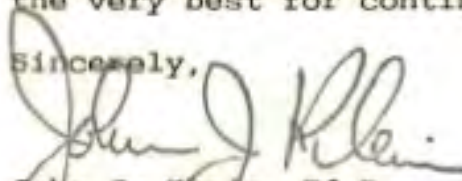
Signal Peak Campus  
Woodruff at Overfield Road  
Coolidge, Arizona 85226  
Phone: Area 602:  
836-8243  
723-4141

Dear Edward:

The faculty and staff of Central Arizona College, extend our congratulations to you on your academic performance during this past semester. Your academic performance has resulted in your inclusion on the College's Dean's List. We take pride in recognizing your academic achievement.

I personally commend your academic success and wish you the very best for continued future successes.

Sincerely,

  
John J. Klein, Ed.D  
Vice President of  
Educational Services

JJK:smw

Gila River Skill Center  
P. O. Box 339  
Sedona, Arizona 86247  
Phone: Area 602:  
962-3349  
723-5522  
964-8766

Arizona State Prison Complex  
Butte Avenue  
Florence, Arizona 85232  
Phone: Area 602:  
888-4011

04/29/87

Page 1

SSN 133-32-3615

Edward Schad  
 BOX B40496  
 FLORENCE, AZ 85232  
 Major: Drafting

Div: I Advisor:

ATTNPT EARNED					
	GR	CR	CR	GT	
08/81					
40A101 01 INTRO ASTRONOMY	C	4.0	4.0	8.00	Remarks
40H101 02 CHILD GROW & DEV	B	3.0	3.0	9.00	
Semester:		7.0	7.0	17.00	GPA: 2.43
01/82					
10A100 06 INTRO TO BUSINESS	A	3.0	3.0	12.00	Remarks
50L180 02 MORAL CHOICES	A	3.0	3.0	12.00	
50H20003 CRIME/JUSTICE IN USA	A	3.0	3.0	12.00	
Semester:		9.0	9.0	36.00	GPA: 4.00
08/82					
15A120101 CAREER AWARENESS	A	3.0	3.0	12.00	Remarks
50E101 01 AMERICAN GOVT	A	3.0	3.0	12.00	
50H100 03 INTRO SOCIOLOGY	B	3.0	3.0	9.00	
50H202003 CONTEMP ISSUES FAMIL	A	3.0	3.0	12.00	
Semester:		12.0	12.0	45.00	GPA: 3.75
01/83					
50E200002 TAXATION	A	3.0	3.0	12.00	Remarks
50H200102 POPULAR CULTURE	A	3.0	3.0	12.00	
Semester:		6.0	6.0	24.00	GPA: 4.00
08/83					
40A101 01 INTRO ASTRONOMY	A	4.0	4.0	16.00	Remarks
50F101 03 INTRO PSYCH I	A	3.0	3.0	12.00	
Semester:		7.0	7.0	28.00	GPA: 4.00
01/84					
10F120 02 INTRO TO DF	A	3.0	3.0	12.00	Remarks
20A101 03 ENGLISH COMP 1	A	3.0	3.0	12.00	
Semester:		6.0	6.0	24.00	GPA: 4.00
01/86					
MAT104 PG College Algebra	A	3.0	3.0	12.00	Remarks
Semester:		3.0	3.0	12.00	GPA: 4.00
08/86					
LIT201 PS American Lit I	X	0.0	0.0	0.00	Remarks
PHI101 PH Intro to Philosophy	A	3.0	3.0	12.00	
Semester:		3.0	3.0	12.00	GPA: 4.00
01/87					
ENG102 PR English Comp II	IP	0.0	0.0	0.00	Remarks
LIT202 PG American Lit II	IP	0.0	0.0	0.00	
PHI103 PH Intro to Logic	IP	0.0	0.0	0.00	
Semester:		0.0	0.0	0.00	GPA: 0.00

04/29/87

Page 2

Edward Schad

SSN 133-32-2615

=====

ATTMPT EARNED

	GR	CR	CR	GP	
Cumulative:	53.0	53.0	198.00	GPA: 3.74	



# GRADE REPORT

EDWARD SCHAD

104 133-32-2615

	GR	CR	CR	GP	
----- 01/88 -----					REMARKS
ART101 PH BASIC DESIGN I	A	3.0	3.0	12.00	
SCI100 PA FUND OF SCIENCE	A	4.0	4.0	16.00	
SEMESTER:		7.0	7.0	28.00	GPA: 4.00
----- 08/88 -----					REMARKS
AJS280BPG INTRO TO LAW	A	3.0	3.0	12.00	
ART107 PK BASIC DRAWING	A	3.0	3.0	12.00	
LIT201 PT AMERICAN LIT I	B	3.0	3.0	9.00	
SEMESTER:		9.0	9.0	33.00	GPA: 3.67
----- 01/89 -----					REMARKS
AJS280APS LEGAL RESEARCH	A	3.0	3.0	12.00	
ARH200 PA PRIN OF ARCHAEOLOGY	A	3.0	3.0	12.00	
ART280CPG BASIC DRAWING II	A	3.0	3.0	12.00	
MAT100 PI COLLEGE MATHEMATICS	B	3.0	3.0	9.00	
SPA101 PE ELEM SPANISH I	A	4.0	4.0	16.00	
SEMESTER:		16.0	16.0	61.00	GPA: 3.81
----- 08/89 -----					REMARKS
AJS280APC LEGAL WRITING	A	3.0	3.0	12.00	
ART280APG BASIC LETTERING	WP	0.0	0.0	0.00	WITHDREW 01/26/90
GLG100 PH GENERAL GEOLOGY	A	4.0	4.0	16.00	
MAT102 PC FINITE MATH	A	3.0	3.0	12.00	
SEMESTER:		10.0	10.0	40.00	GPA: 4.00
----- 01/90 -----					REMARKS
CIS110 PL COMPUTERS-FIRST LOOK	A	3.0	3.0	12.00	
MUL100 PE MUSIC APPRECIATION	A	3.0	3.0	12.00	
PHI105 PA INTRO TO ETHICS	A	3.0	3.0	12.00	
POS104 PE CONTEMP ISSUES/POLSC	A	3.0	3.0	12.00	
SEMESTER:		12.0	12.0	48.00	GPA: 4.00
----- 08/90 -----					REMARKS
ARH210 PH ARCHAEO OF SOUTHWEST	A	3.0	3.0	12.00	
ART280BPK ANIMATED DRAWING	WP	0.0	0.0	0.00	WITHDREW 12/07/90
SEMESTER:		3.0	3.0	12.00	GPA: 4.00
----- 01/91 -----					REMARKS
ASG102 PK CULTURAL ANTHROPOLOGY	A	3.0	3.0	12.00	
BIO100 PH BIOLOGY CONCEPTS	B	4.0	4.0	12.00	
GRS208 PS INTRO TO STATISTICS	B	3.0	3.0	9.00	
MGT122 PK SMALL BUSINESS MGMT	A	3.0	3.0	12.00	
SPA280APM HISTORY OF MEXICO	A	3.0	3.0	12.00	
SEMESTER:		16.0	16.0	57.00	GPA: 3.56
----- 06/91 -----					REMARKS
MKT280APK MKTING SMALL BUSINESS	W	0.0	0.0	0.00	05/05/91 - 07/03/91
SEMESTER:		0.0	0.0	0.00	GPA: 0.00
CUMULATIVE:		116.0	116.0	522.00	GPA: 3.73

EDWARD SCHAD  
BOX 840496  
FLORENCE, AZ 85232



# The Dean's List

NOMINATED BY:  
Charles W. Hall  
Dean Of Instruction

March 16, 1983

## CONTRIBUTING EDITORS

### DR. WESLEY AHER

Executive Director  
Colorado Association of  
School Executives  
Englewood, CO

### MARGARET S. CRAG

Secretary  
American Association for  
Gifted Children  
New York, NY

### CONRAD D. DEWEY

Dean  
School of Letters and Science  
California State University  
Los Angeles, CA

### J. DOMINGUEZ

Dean  
College of Business & Economics  
University of Wisconsin  
Whitewater, WI

### OSCAR G. JOHNSON

Dean  
College of Agricultural Sciences  
Colorado State University  
Fort Collins, CO

### VALERIE LEVITAN

Executive Director  
Zonta International  
Chicago, IL

### B. K. MARKS

Dean  
Clark Houston State University  
College of Business Administration  
Huntsville, TX

### WILLIAM R. PORTER

University Professor  
Bingham Young University  
Provo, UT

### GERALD SOLE

Associate Professor of Law  
Suffolk University Law School  
Boston, MA

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University Professor  
Bingham Young University  
Provo, UT

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Executive Secretary Emeritus  
South & West Society  
New York, NY

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Dean of Schools  
Middle Tennessee  
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#### DR. G. ARTHUR FERGUSON

President  
Southern Farm and  
Lumbering Society  
Aurora, IL

#### DR. HERBERT M. MCGEE

President  
Wayne State University  
Detroit, MI

#### ALAN MUELS

Director of Admissions  
New York University  
New York, NY

#### DR. JAMES SCHILLHAMMER

Director of Admissions & Records  
Western State University  
Greeley, CO

#### THOMAS TESSKY

President of Student  
Management & Activities  
University of Southern  
California, Los Angeles, CA

#### ALAN A. WOLF

President  
University of Maryland  
College Park, MD

Edward Schadt  
Box B40496  
Florence, AZ 85232

Dear Edward:

Congratulations. You have been selected by the above named faculty member to receive honorary award recognition by having your achievements published in the sixth annual edition of THE NATIONAL DEAN'S LIST, 1982-83.

THE NATIONAL DEAN'S LIST is the largest, most prestigious publication recognizing academically gifted students selected by their college dean or faculty representative. While 2,000 colleges and universities select students for this award each year, on a national basis, only one-half of 1 percent of our nation's college students are included. We commend you for your accomplishments.

As a NATIONAL DEAN'S LIST student, you may be eligible to compete for one of twenty \$1,000 scholarships. You are also eligible to use the Student Referral Service (SRS), a valuable reference service for students applying to graduate school or seeking employment. A scholarship application and SRS form will be sent to you after your biography form has been processed.

We wish to emphasize that there are no financial obligations attached to this award. If you wish a copy of the book for your personal library, ordering information is included on your biography form. Since this award represents an honor for your school, as well as yourself, please return your completed form by April 13, 1983.

Best wishes for continued success,

THE NATIONAL DEAN'S LIST

Paul C. Krouse, Publisher

PCK:qq  
enclosures

*Southern Career Institute*

Hereby awards this

# Diploma

to

EDWARD H. SCHAD

In Recognition of Completion of the

**Paralegal Specialized Practices Program**

With all the rights, privileges and immunities thereunto appertaining.

Given this 20th day of November A.D.

19 91 under the seal of Southern Career Institute,

Boca Raton, Florida.

*Susan F. Schurz*

Director of Education

*W. H. Hagan*  
President





# Southern Career Institute

presents this

## Certificate of Completion (Paralegal Entry Level)

to **Edward H. Schan**

This certifies that the aforementioned has completed the entry level section of their program of study at Southern Career Institute, and in doing so has satisfied the requirements for advancement into the specialized section of the Paralegal Specialized Practices Program.

Given this 12th day of December A.D.  
19 90 under the seal of Southern Career  
Institute at Boca Raton, Florida.

Susan F. Schmitz  
Director of Education

Richard W. H. H. H.  
President



# Southern Career Institute



## Certificate of Appreciation

*Edward H. Schaal*  
to

*In recognition of your efforts in referring students to  
the Southern Career Institute Specialized Paralegal  
Practices Program you have helped your fellow  
inmates to improve their lives and given them hope  
for the future.*

*Susan S. Schurz*  
Director of Education

*Richard D. Grogan*  
President

# The Pink Banana Tree



By

Jean Armitage

&

Ed H. Schadt



2



Benji's mother had the loudest voice in all the village when she was mad at him.

3



ER Page 65

Benjy put his hands over his ears and ran down the path, over the bridge where the bullfrogs sat lazily in the cool water below, and on into the trees at the edge of the jungle





This is where he came when he wanted to be quiet, but it was not quiet. All the monkeys from miles around were jumping up and down in excitement.



5



ER Page 67

Benjy went to see what all the noise was about, and there it was. Right in the middle of the other trees was a banana tree, growing pink bananas.



They were so juicy looking and Benji wanted them down, but he was so small and they were so high up. He knew what he would do. He would fetch Kendo, who cut the bananas from the other trees, then everyone in the village could have some.





When Benjy told him of this wonderful tree Kendo said he would help, but he really wanted the bananas for himself, because he knew everyone in the village would want to buy these special bananas.. He could make a lot of money from them.





Quickly he came, with his wheelbarrow, his short ladder and his machete. As Benji watched him, he was up the ladder and handing bunches down carefully. By the time Kendo came down the ladder, Benji had loaded the bunches into the wheelbarrow.



As they walked back along the path, and over the cool water, the bullfrogs lifted their heads to see this strange sight. The man was pushing a pink animal, with one leg, backwards by the horns, and it was squeaking at him.





When Benjy and Kendo got back to the village Benjy wanted to give the bananas away, but Kendo started to sell them and keep the money for himself. Benjy was sad. He had discovered the bananas and now he had no money to buy one.



From every fire there came the delicious smell of cooking. He longed to have a taste, but all his mother could afford was rice and chilli sauce for their meal that night.



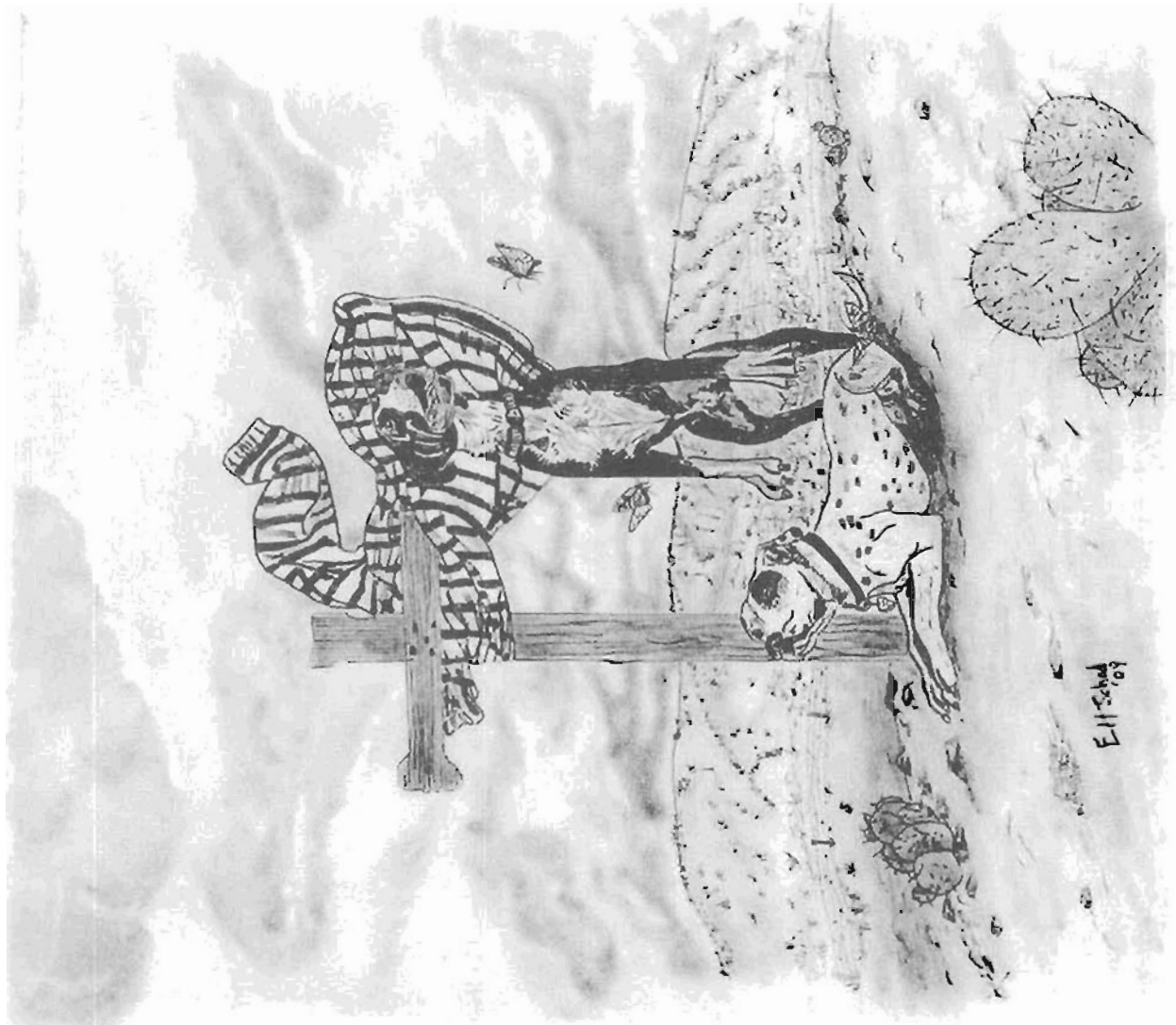
The men came home from work, , hungry and ready for this new taste, but soon the village was full of angry buzzing voices. The bananas tasted horrible.





Everyone was spitting the food out. They shouted to Kendo to come out and give them their money back, and then they started to pelt him with the bananas that were left.





Edward H. Schad, Arizona  
LifeLines Art Competition 2010 - 1st Prize

The people shouted

We have cooked them with chillies.  
We have cooked them with rice.  
We have cooked them with sugar,  
But they just aren't nice.  
We have cooked them with ginger,  
And put them in a stew  
And if you bring us any more,  
We'll cook them with you.

They told Kendo to take them back to where he found them.





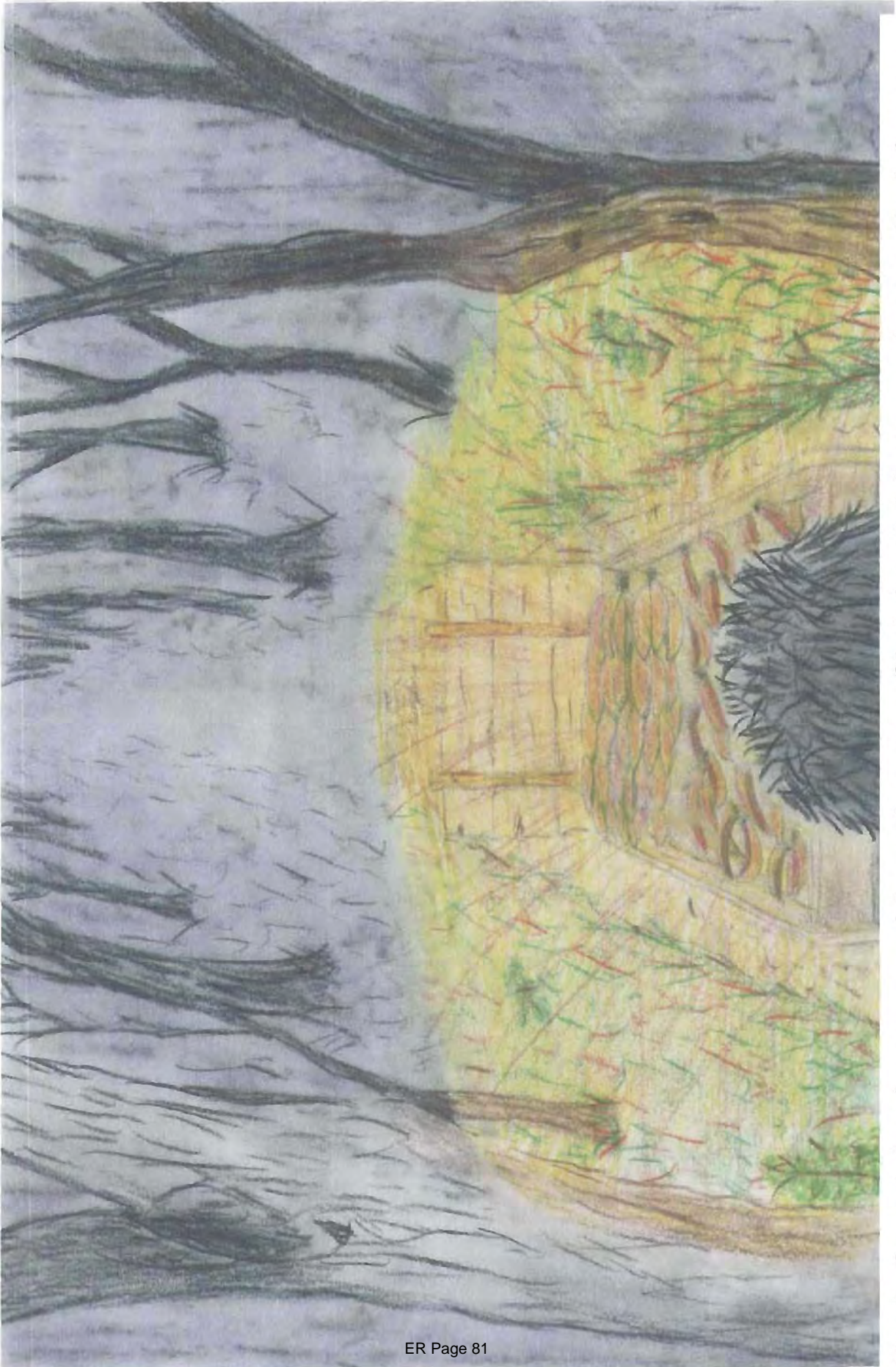
Kendo told Benjy that it was all his fault for finding them , so he could load the barrow and take them all back into the jungle. "I don't want to see another pink banana," he said as he prodded Benjy in the chest.





Benji was very tired when he got back to the trees, just as the light was fading from the sky. Soon it was dark. Then something wonderful happened.





Benjy found that he was pushing a barrow of bright pink banana shapes. Each banana was like a pink fairy light, glowing with a soft light which shone all around, and lit the path for him.





Benji's eyes shone as bright as the bananas as he hurried back to the village.



All the people came to see the sight, and Benjy gave them all a banana light to hang outside their houses. Everyone smiled. Now all but one of the bananas had gone.





Benji's mother watched as he brought the banana light to her to hang outside their home.





Benji felt her arm around his shoulders. She was very proud of him. It would be a long time before she was mad at him again.



This book has been a collaboration between myself and Ed. H. Shad. I have written for many years for adults and children, but in 2010, I joined the Human Writes Organisation, which links up prisoners on Death Row in America, with pen friends in the UK. I was lucky to have the opportunity to write to Ed, and have found him to be a good communicator, and a knowledgeable and intelligent man.

Since then he has written almost every week, but it wasn't until he sent me some of his sketches, that I realised he was talented artistically as well. I was amazed that he could produce such work, in the very restrictive circumstances he was in. The only art equipment he was allowed to buy, was poor quality paper and a set of small, golf pencil sized crayons. In time I approached him about illustrating one of my children's stories. He was enthusiastic about the project and went to great time and trouble to produce the work you see in the book. Despite the enormous challenge, he produced twenty original and unique drawings

His self portrait was an early drawing to help me to put a face to the letter writer. Ed has been on Death Row for many years, but he has kept himself fit and mentally agile. He is allowed only two books in his cell. One of these has been a dictionary. Human Writes, helps to keep the written word alive and to bring together people who oppose the death penalty

Jean Armitage



Dear Ra,

I was going to send you this first draft as a surprise Christmas Present, but in view of the bad news in your letter I decided to get it printed off and sent a.s.a.p. I think you may have time to forward it to Kelley before he hearing if you think it would do any good.

Love Jean x

It needs a few tweaks, but doesn't it look good when pictures and text are put together?

Best of luck dear friend.





*Almighty and everlasting God, you have always multiplied your Church, and with your light and grace have strengthened the hearts of those whom you have regenerated, confirming unto them your covenant and faithfulness: Grant unto us increase both of faith and knowledge, that we may rejoice in our Baptism and really and heartily renew our covenant with you; through Jesus Christ, your Son, our Lord. Amen.*

I believe in God, the Father almighty,  
creator of heaven and earth.  
I believe in Jesus Christ, his only Son, our Lord.  
He was conceived by the power of the Holy Spirit  
and born of the Virgin Mary.  
He suffered under Pontius Pilate,  
was crucified, died, and was buried.  
He descended to the dead.  
On the third day he rose again.  
He ascended into heaven,  
and is seated at the right hand of the Father.  
He will come again to judge the living and the dead.  
I believe in the Holy Spirit,  
the holy catholic Church,  
the communion of saints,  
the forgiveness of sins,  
the resurrection of the body,  
and the life everlasting.

As therefore you received Christ Jesus the Lord, so live in him, rooted and built up in him and established in the faith, just as you were taught, abounding in thanksgiving.

*Colossians 2:6-7*

The Father in Heaven, for Jesus' sake, renew and increase in you the gift of the Holy Ghost, to your strengthening in faith, to your growth in grace, to your patience in suffering, and to the blessed hope of everlasting life. Amen.

In celebration of the rite of

# Confirmation

EDWARD SCHAU

NAME

having been instructed and strengthened  
in the truths of God's Holy Word;

has confessed a personal baptismal faith  
in the Father, Son, and Holy Spirit,

and assumes a deeper identification with

KING OF GLORY LUTHERAN  
CONGREGATION  
TEMPE, AZ

and a greater participation in its mission.

Ron Kopitz  
Roger Gordon

PASTOR

Nov. 17 82

DATE

THE APOSTLE'S CREED

I believe in God the Father Almighty, Maker of heaven and earth.

And in Jesus Christ his only Son our Lord, Who was conceived by the Holy Ghost, Born of the Virgin Mary, Suffered under Pontius Pilate, Was crucified, dead, and buried: He descended into hell; The third day he rose again from the dead; He ascended into heaven, And sitteth on the right hand of God the Father Almighty; From thence he shall come to judge the quick and the dead.

I believe in the Holy Ghost; The Holy Christian Church, the Communion of Saints; The Forgiveness of sins; The Resurrection of the body, And the Life everlasting. Amen.



# Certificate of Church Membership

This Certifies that

Edward Seward

has publicly confessed Jesus Christ  
as Lord and Savior and has been received  
into the full membership of the

King of Glory Lutheran

Church of

Tempe, Arizona

On this 17 day of November

in the year of our Lord 19 82

Ken Roberts  
Raymond Gordon

Pastor

Search the scriptures;  
for in them ye think  
ye have eternal life:  
and they are they  
which testify of Me.

John 5:39

Create in me a clean  
heart, O God; and  
renew a right spirit  
within me.

Psaltn 51:10



JESUS CHRIST PRISON MINISTRY

# Certificate of Achievement

This certifies that

**Edward H. Schad, Jr.**

has successfully completed the  
"Change Your Life Biblically"-  
Bible Study Course



Signature of Student	Date
	7-12-07
Signature of Instructor	Date

# AMERICAN BIBLE ACADEMY

Presents this Certificate to

Edward H. Schad, Jr.

upon successful completion of

Study Course The Gospel According to John

Awarded the 7th day of August, 2007.



*Joseph M. Smith*  
ACADEMIC DEAN

*Mrs. Gwen Woodell*  
REGISTRAR



GRADE REPORT  
AMERICAN BIBLE ACADEMY  
P.O. BOX 1627  
JOPLIN, MO 64802-1627

NAME: Edward H. Schad, Jr.

STUDENT ID#: 314495

COURSE: The Gospel According to John

DATE: 8/07/07

EXAM 1: 98

EXAM 2: 97

EXAM 3: 97

FINAL GRADE: 97

CREDITS: 0

Grading Policy - The grading system used by A.B.A. is as follows:

A+ .....100-99%	A .....98-95%	A- .....94-90%	B+ .....89-87%	B .....86-84%
B- .....83-80%	C+ .....79-77%	C .....76-74%	C- .....73-70%	D+ .....69-67%
D .....66-64%	D- .....63-60%	F .....59-0%		

Please update any changes in your mailing address.

Websites: [www.ababible.org](http://www.ababible.org) \* [www.arm.org](http://www.arm.org)



# AMERICAN BIBLE ACADEMY

Presents this Certificate to

Edward H. Schad, Jr.

upon successful completion of

Study Course Christian Doctrine, Vol. One

Awarded the 16th day of October, 2007.



Joseph M. Smith  
ACADEMIC DEAN  
Mrs. Gwen Wadell  
REGISTRAR



GRADE REPORT  
AMERICAN BIBLE ACADEMY  
P.O. BOX 1627  
JOPLIN, MO 64802-1627

NAME: Edward H. Schad, Jr.

STUDENT ID#: 314495

COURSE: Christian Doctrine, Vol. One

DATE: 10/16/07

EXAM 1: 98 EXAM 2: 99 EXAM 3: 96

FINAL GRADE: 98

CREDITS: 1

Grading Policy - The grading system used by A.B.A. is as follows:

A+ ....100-99%	A .....98-95%	A- .....94-90%	B+ .....89-87%	B .....86-84%
B- .....83-80%	C+ .....79-77%	C .....76-74%	C- .....73-70%	D+ .....69-67%
D .....66-64%	D- .....63-60%	F .....59-0%		

Please update any changes in your mailing address.

Websites: [www.abaa.org](http://www.abaa.org) • [www.arm.org](http://www.arm.org)



# AMERICAN BIBLE ACADEMY

Presents this Certificate to

Edward H. Schad, Jr.

upon successful completion of

Study Course Christian Doctrine, Vol. One

Awarded the 16th day of October, 2007.



Joseph M. Smith  
ACADEMIC DEAN  
Mrs. Gwen Wadell  
REGISTRAR



GRADE REPORT  
AMERICAN BIBLE ACADEMY  
P.O. BOX 1627  
JOPLIN, MO 64802-1627

NAME: Edward H. Schad, Jr.

STUDENT ID#: 314495

COURSE: Christian Doctrine, Vol. One

DATE: 10/16/07

EXAM 1: 98 EXAM 2: 99 EXAM 3: 96

FINAL GRADE: 98

CREDITS: 1

Grading Policy - The grading system used by A.B.A. is as follows:

A+ ....100-99%	A .....98-95%	A- .....94-90%	B+ .....89-87%	B .....86-84%
B- .....83-80%	C+ .....79-77%	C .....76-74%	C- .....73-70%	D+ .....69-67%
D .....66-64%	D- .....63-60%	F .....59-0%		

Please update any changes in your mailing address.

Websites: [www.abaa.org](http://www.abaa.org) • [www.arm.org](http://www.arm.org)



# AMERICAN BIBLE ACADEMY

Presents this Certificate to

Edward H. Schad, Jr.

upon successful completion of

Study Course Christian Doctrine, Vol. Two

Awarded the 18th day of December, 2007.



*Joseph M. Schach*  
ACADEMIC DEAN  
*Mrs. Susan Whitell*  
REGISTRAR



GRADE REPORT  
AMERICAN BIBLE ACADEMY  
P.O. BOX 1627  
JOPLIN, MO 64802-1627

NAME: Edward H. Schad, Jr.

STUDENT ID#: 314495

COURSE: Christian Doctrine, Vol. Two

DATE: 12/18/07

EXAM 1: 100 EXAM 2: 99 EXAM 3: 98

FINAL GRADE: 99 CREDITS: 1

Grading Policy - The grading system used by A.B.A. is as follows:

A+.....100-99%	A.....98-95%	A-.....94-90%	B+.....89-87%	B.....86-84%
B-.....83-80%	C+.....79-77%	C.....76-74%	C-.....73-70%	D+.....69-67%
D.....66-64%	D-.....63-60%	F.....59-0%		

Please update any changes in your mailing address.

Websites: [www.ababible.org](http://www.ababible.org) • [www.arm.org](http://www.arm.org)

# AMERICAN BIBLE ACADEMY

Presents this Certificate to

Edward H. Schad, Jr.

upon successful completion of

Study Course The Book of Acts Vol One

Awarded the 26th day of February, 2008.



*Joseph M. Misk*  
ACADEMIC DEAN  
*Mrs. Gwen Wadell*  
REGISTRAR



GRADE REPORT  
AMERICAN BIBLE ACADEMY  
P.O. BOX 1627  
JOPLIN, MO 64802-1627

NAME: Edward H. Schad, Jr.

STUDENT ID#: 314495

COURSE: The Book of Acts Vol One

DATE: 2/26/08

EXAM 1: 98

EXAM 2: 99

EXAM 3: 100

FINAL GRADE: 99

CREDITS: 1

Grading Policy - The grading system used by A.B.A. is as follows:

A+ .....100-99%	A .....98-95%	A- .....94-90%	B+ .....89-87%	B .....86-84%
B- .....83-80%	C+ .....79-77%	C .....76-74%	C- .....73-70%	D+ .....69-67%
D .....66-64%	D- .....63-60%	F .....59-0%		

Please update any changes in your mailing address.

Websites: [www.abi.org](http://www.abi.org) • [www.abm.org](http://www.abm.org)



# AMERICAN BIBLE ACADEMY

Presents this Certificate to

Edward H. Schad, Jr.

upon successful completion of

Study Course The Book of Acts Vol One

Awarded the 26th day of February, 2008.



*Joseph M. Mikh*  
ACADEMIC DEAN  
*Mrs. Gwen Wadell*  
REGISTRAR



GRADE REPORT  
AMERICAN BIBLE ACADEMY  
P.O. BOX 1627  
JOPLIN, MO 64802-1627

NAME: Edward H. Schad, Jr.

STUDENT ID#: 314495

COURSE: The Book of Acts Vol One

DATE: 2/26/08

EXAM 1: 98

EXAM 2: 99

EXAM 3: 100

FINAL GRADE: 99

CREDITS: 1

Grading Policy - The grading system used by A.B.A. is as follows:

A+ .....100-99%	A .....98-95%	A- .....94-90%	B+ .....89-87%	B .....86-84%
B- .....83-80%	C+ .....79-77%	C .....76-74%	C- .....73-70%	D+ .....69-67%
D .....66-64%	D- .....63-60%	F .....59-0%		

Please update any changes in your mailing address.

Websites: [www.abar.org](http://www.abar.org) • [www.abm.org](http://www.abm.org)

# AMERICAN BIBLE ACADEMY

Presents this Certificate to

Edward H. Schad, Jr.

upon successful completion of

Study Course The Book of Acts, Vol. Two

Awarded the 20th day of May, 2008



Joseph M. Schach  
ACADEMIC DEAN  
Mrs. Gwen Adell  
REGISTRAR



GRADE REPORT  
AMERICAN BIBLE ACADEMY  
P.O. BOX 1627  
JOPLIN, MO 64802-1627

NAME: Edward H. Schad, Jr.

STUDENT ID#: 314495

COURSE: The Book of Acts, Vol. Two

DATE: 5/20/08

EXAM 1: 98

EXAM 2: 100

EXAM 3: 100

FINAL GRADE: 99

CREDITS: 1

Grading Policy - The grading system used by A.B.A. is as follows:

A+ .....100-99%	A .....98-95%	A- .....94-90%	B+ .....89-87%	B .....86-84%
B- .....83-80%	C+ .....79-77%	C .....76-74%	C- .....73-70%	D+ .....69-67%
D .....66-64%	D- .....63-60%	F .....59-0%		

Please update any changes in your mailing address.

Websites: [www.abacademy.org](http://www.abacademy.org) • [www.arm.org](http://www.arm.org)



# AMERICAN BIBLE ACADEMY

Presents this Certificate to

Edward H. Schad, Jr.

upon successful completion of

Study Course Gospel of Mark

Awarded the 19th day of August, 2008



Joseph M. Smith  
ACADEMIC DEAN

Mrs. Gwen Woodell  
REGISTRAR



GRADE REPORT  
AMERICAN BIBLE ACADEMY  
P.O. BOX 1627  
JOPLIN, MO 64802-1627

NAME: Edward H. Schad, Jr.

STUDENT ID#: 314495

COURSE: Gospel of Mark

DATE: 8/19/08

EXAM 1: 99

EXAM 2: 100

EXAM 3: 98

FINAL GRADE: 99

CREDITS: 1

Grading Policy - The grading system used by A.B.A. is as follows:

A+ ....100-99%	A .....98-95%	A- .....94-90%	B+ .....89-87%	B .....86-84%
B- .....83-80%	C+ .....79-77%	C .....76-74%	C- .....73-70%	D+ .....69-67%
D .....66-64%	D- .....63-60%	F .....59-0%		

Please update any changes in your mailing address.

Websites: [www.ababible.org](http://www.ababible.org) • [www.arm.org](http://www.arm.org)

# AMERICAN BIBLE ACADEMY

Presents this Certificate to

Edward H. Schad, Jr.

upon successful completion of

Study Course Galatians & Philippians

Awarded the 16th day of December, 2008



Joseph M. Smith  
ACADEMIC DEAN  
Mrs. Gwen Wadell  
REGISTRAR



GRADE REPORT  
AMERICAN BIBLE ACADEMY  
P.O. BOX 1627  
JOPLIN, MO 64802-1627

NAME: Edward H. Schad, Jr.

STUDENT ID#: 314495

COURSE: Galatians & Philippians

DATE: 12/16/08

EXAM 1: 99

EXAM 2: 99

EXAM 3: 99

FINAL GRADE: 99

CREDITS: 1

Grading Policy - The grading system used by A.B.A. is as follows:

A+ ....100-99%	A .....98-95%	A- .....94-90%	B+ .....89-87%	B .....86-84%
B- .....83-80%	C+ .....79-77%	C .....76-74%	C- .....73-70%	D- .....69-67%
D .....66-64%	D- .....63-60%	F .....59-0%		

Please update any changes in your mailing address.

Websites: [www.arm.org](http://www.arm.org) • [www.arm.org](http://www.arm.org)



**RE: Edward Schad #40496**  
**Daisy Kirkpatrick** to: 'Kelley Henry'

09/25/2013 12:41 PM

History: This message has been replied to and forwarded.

Kelley,

At this point I have not received anything from Yavapai County. I do have the submissions from February 2013 from Ms. Henry. Mr. John Grove called Monday and indicated that he was not going to make a statement at this time.

Daisy

-----Original Message-----

From: Kelley Henry [mailto:Kelley\_Henry@fd.org]  
Sent: Wednesday, September 25, 2013 9:09 AM  
To: Daisy Kirkpatrick  
Subject: RE: Edward Schad #40496

Ms. Kirkpatrick,

I am following up on my email below. If the Board has received a submission from the Yavapai County Attorney's office, please let me know. Also, if you have received any other submissions either in favor of Mr. Schad or opposed, please let me know that as well. To date, I have received no such information. I have also not been advised as to whether the family of Mr. Grove has taken a position. Thank you for your prompt response to this email.

Cordially,

Kelley J. Henry  
Supervisory AFD - Capital Habeas  
810 Broadway, Suite 200  
Nashville, TN 37203  
(615) 695-6906 (direct)  
(615) 337-0469 (cell)

From: Daisy Kirkpatrick <DKirkpatrick@azboec.gov>  
To: Kelley Henry <Kelley\_Henry@fd.org>,  
Date: 09/05/2013 09:56 PM  
Subject: RE: Edward Schad #40496

Kelley,

I don't show we ever got a submission from Yavapai County. Please be advised that Mr. Schad's Reprieve hearing has been tentatively scheduled for October 2, 2013.

Daisy Kirkpatrick  
Administrative Assistant III  
Arizona Board of Executive Clemency  
1645 W Jefferson, Suite 101

Phoenix, AZ 85007  
602-542-5656 ext 334  
602-542-5680 (Fax)

-----Original Message-----

From: Kelley Henry [mailto:Kelley\_Henry@fd.org]  
Sent: Tuesday, August 27, 2013 9:15 AM  
To: Daisy Kirkpatrick  
Subject: Edward Schad #40496

Daisy,

Did the Yavapai Attorney General's Office ever offer a submission regarding Mr. Schad's clemency request last February? The last email I have says that they did not. If they did, could you email it to me?

Thanks much.

Kelley

Kelley J. Henry  
Supervisory AFD - Capital Habeas  
810 Broadway, Suite 200  
Nashville, TN 37203  
(615) 695-6906 (direct)  
(615) 337-0469 (cell)



Declaration of Duane Belcher

I, Duane Belcher, under penalty of perjury, state the following to be true and accurate to the best of my personal recollection and knowledge.

1. I served on/for the Arizona Board of Executive Clemency (the "Board") in the following capacities from approximately 1992 until April 23, 2012: Board Member, Chairman, Chairman/Executive Director, and Executive Director.

2. My last term ended in January, 2011, however, I continued serving on the Board until April, 2012 when a new Board Member was nominated and subsequently confirmed by the Arizona State Senate. I had previously submitted an application to be re-appointed to serve another term on the Board. I was informed that I would not be considered for re-appointed to the Board but was asked if I were willing to remain with the Board for a period of time to serve in a training capacity for the three new incoming Board Members.

3. In my view, my vote as a Board Member was mine to make based on the information (documents and testimony) that I received during a public hearing. The Governor could not "own my vote"; only I could. I always voted my conscience.

4. In early 2012, I had a meeting with Joe Sciarotta and Scott Smith, General Counsel and Deputy Chief of Staff to Governor Brewer. They were direct, and made it clear to me, that the Governor's office was unhappy with my vote to recommend clemency for William Macumber in 2009 and again in 2011. I was told that the Governor was "blindsided" by the Board's vote to recommend Clemency in the Macumber case. They also questioned me regarding the Board's vote to recommend clemency in the case of Robert Flibotte ADC #265716. The aforementioned were considered to be high profile cases.

5. If the Board voted against recommending clemency, the matter ended, however, if the Board voted to recommend clemency, the case would then be submitted to the Governor for her to accept or reject. In my view the Governor's Office was attempting to influence the Board's vote in certain cases that were recommended for executive clemency.

//

//

//

6. I was abruptly terminated on April 23, 2012, by Scott Smith from my training agreement. Earlier that day, the three new members of the Board had failed to show up for hearings at the scheduled beginning time, leaving members of the public waiting due to insufficient number of Board Members to conduct hearings. Although no official reason was given in writing, I was informed by Scott Smith that I should have contacted the new Board Members and made sure that they were present.

7. I served on the Board for approximately 20 years. When Governor Brewer decided to replace three Board members (including myself) at one time, I was quite surprised. During my tenure with the Board, I had never seen a time where an Arizona Governor had replaced so many Board members at one time. It was my opinion that the Governor's office wanted Board Members who would vote the wishes of her office, rather than vote their conscience, based on the facts and circumstances of each case.

Signed this 26<sup>th</sup> day of September, 2013.

A handwritten signature in cursive script that reads "Duane Belcher". The signature is written in dark ink and is positioned above a horizontal line.

Duane Belcher

### Declaration of Ellen Stenson

I, Ellen Stenson, under penalty of perjury, state the following to be true and accurate to the best of my personal knowledge, information and belief:


1. I served as a Member on the Arizona Board of Executive Clemency (the "Board") from 2007, when I was appointed by Governor Napolitano, until April of 2012.
2. When my term expired in 2012, I had hoped to continue to serve on the Board. I applied to maintain my position but was not chosen by Governor Brewer. My replacement occurred at the same time as those of Chairman Duane Belcher, who had served for at least twenty years, and Member Marilyn Wilkens. All three of us wished to remain on the Board, and we expressed that wish to the Governor's Office. I was very surprised that the Governor nevertheless replaced three of the five-member Board at once. It appeared to be an unusual, if unprecedented event. The Governor's action did not make sense to me because I believed it would be very difficult to select and adequately train a chairperson and two members before their votes were needed. I believed that it would be unfair to the inmates, the victims' families, and anyone else involved in the process.
3. Our ousters in April 2012 generated significant press because it was an unusual event. The Governor's spokesperson was quoted in the press stating that our departures were not forced in retaliation for any of our previous votes. However, my experience during my interview with the Executive Clemency Selection Committee ("Committee") led me to conclude that this was not true.
4. My 2012 interview was a very different experience from my 2007 interview. Committee members interviewing me in 2012 included Scott Smith, Joe Sciarotta, Eileen Klein, Linda Stiles, and one other individual. However, in contrast to my previous interview, which was more of a relaxed conversation among the Committee and myself, this interview was short and combative. Scott Smith ran the show, and most of the interview consisted of Mr. Smith firing questions at me.
5. Mr. Smith specifically asked me whether I stood by my 2009 vote to recommend commutation for Bill Macumber, a man who had served over 30 years for a murder and had brought forth substantial evidence to the Board that he was innocent. Governor Brewer had denied Mr. Macumber clemency in November 2009, in spite of the Board's unanimous recommendation of five pro-clemency votes. Her decision made national news and generated significant criticism. Two years later, Mr. Macumber was permitted to re-apply for clemency. Mr. Belcher and I were the only still-sitting Board

members from the 2009 Board which had unanimously recommended clemency. His hearing was scheduled for March, 2012. However, well before the hearing date was scheduled, I had a trip planned to Ohio to assist my sister in adopting two children, and the trip could not be rescheduled. I understand that the 2012 vote was 2-2, with Chairman Belcher and Member Jack LaSota voting for clemency and Ellen Kirschbaum and Marilyn Wilkens voting against it. Because there was a tie, the case was not sent to the Governor to decide. Had I been able to be present for the vote, assuming that the evidence was substantially the same as in 2009, I would have voted again to recommend clemency, and the case would have gone to the Governor again. At the time of my Committee interview in 2012, Mr. Macumber was still imprisoned, and so it was quite possible that his case would come before the Board again.

6. My response to Mr. Smith's question whether I stood by my 2009 vote was Yes. I told him that I still believed that Mr. Macumber deserved a chance at parole and that I would stand by my 2009 vote. I was not reappointed. I believe that my 2009 Macumber vote in combination with my interview response that I did not regret my 2009 vote and my indication that I would likely vote the same way, if given the chance, influenced the Governor's decision to oust me from the Board.

7. Another event that concerned me was that in 2009, shortly after Governor Brewer took office, the legislature voted to significantly reduce our pay and our benefits. The annual salary was suddenly reduced from approximately \$47,000 to \$37,000, and we lost benefits. My understanding is that the Governor's office had lobbied for these cuts. It appeared to me that the clemency Board was the only public agency to receive these kind of salary and benefits cuts at this time. Therefore, I contacted the Arizona Department of Administration to inquire, and I was told that I was correct: no other state agency had been targeted for salary and benefits cuts at this time and that the office was not aware that this had ever been done before. At least one previous Board member left as a direct result of the cuts.

Signed this 20th day of September, 2013, in Maricopa County, Phoenix, Arizona.

  
Ellen Stenson



### **Declaration of Marilyn Wilkens**

I, Marilyn Wilkens, under penalty of perjury, state the following to be true and accurate to the best of my personal knowledge:

1. I served on the Arizona Board of Executive Clemency (the "Board") from January of 2010, when I was appointed by Governor Jan Brewer to fill a vacant position, until April of 2012.

2. At that point, I applied for reappointment to my seat on the Board. I had wanted to continue to serve with my Board colleagues and participate with the important deliberative work of the panel. I was scheduled for an interview by the Executive Clemency Selection Committee, ("Committee"). When I arrived for my interview, I learned that it would be conducted in an executive session, rather than in a public forum. This struck me as unusual. Had I been informed and been aware that I could object to the closed-door discussion, I would have expressed my concern and requested that my interview be conducted in a public session.

3. During my reappointment interview in executive session, it was explained that there was dissatisfaction with my vote on a particular commutation of sentence case; I was informed that I had not voted in accordance with the way the Governor's staff (representing the Governor in the interview), had preferred as an outcome on the case, clearly then indicating the Governor's Office displeasure with my vote.

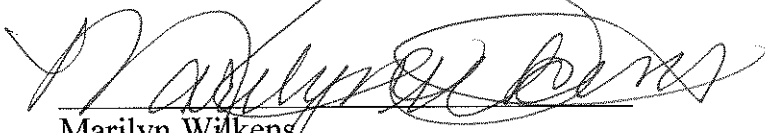
4. Specifically Scott Smith, who at that time was the Deputy Chief of Staff for Governor Jan Brewer, and also a member of the candidate Selection Committee, was displeased that I voted to reduce the sentence of Robert Flibotte, a 74-year first-time male sex offender who had been sentenced to 90 years prison time for possession of child pornography. I explained during my interview, the facts and case history to the Selection Committee members, that I employed in finalizing my decision to vote a recommendation for a reduction in sentence. Mr. Smith was face-to-face with me, with about five inches separating us. He was shaking his finger at me and told me in a raised voice, almost yelling at me, that I voted to let a "sex offender" go. He became very agitated, refusing to accept the tenets of my explanation, which outlined that Mr. Flibotte would be under probation the remainder of his life and also supervised by Gila County Probation Services and would be required to publicly register as a sex offender. This discussion concluded my candidate interview with the Committee.

5. I am comfortable with, and committed to, thoughtfully speaking my mind. This was true for the 34 years I worked as a state employee and the subsequent two plus years I served as a public appointee. When presented with cases, I proceeded to review, deliberate and ultimately vote, commensurate with the facts and records made available to each of us on the Board.

6. In the Flibotte case, the elderly offender had significant support for a sentence reduction from his resident community in Payson, and this was after his case had received substantial ongoing media attention. The Board voted to recommend a sentence reduction for Mr. Flibotte, and the case was subsequently sent to Governor Brewer for a final decision. Governor Brewer denied the Boards' clemency recommendation in the matter of this case.

7. I have concluded that I was not reappointed to continue my service with the Board because the Governor's office does not want to receive clemency recommendations from Board members in high-profile cases. Board recommendations, which obligate the Governor's authority to provide a decision in a publicly visible and hence potentially controversial matter, appear to not be a preferred option in the relationship between the Board and the Executive Branch. That subtlety in desired Board case outcomes, by this Governor, and her current staff, may have been too easily misunderstood by myself and other former and current Board members.

Signed this 26 day of September, 2013, in Maricopa County, Arizona.

  
Marilyn Wilkens

### Declaration of Melvin Thomas

I, Melvin Thomas, under penalty of perjury, state the following to be true and accurate to the best of my personal knowledge:

1. I served as a member of the Arizona Board of Executive Clemency (the "Board") from April 9, 2012, until my resignation on August 5, 2013. I was appointed by Governor Brewer on April 3, 2012, and I swore my loyalty oath of office on April 9, 2012.

2. I was appointed to the Board by Governor Brewer at the same time that Chairman Jesse Hernandez and Member Brian Livingston were appointed to the Board. We were appointed to succeed three outgoing members: Chairman Duane Belcher, Member Marilyn Wilkens, and Member Ellen Stensen.

3. During my time on the Board, my votes were dictated by my conscience. I did not worry about whether my votes were likely to make Governor Brewer or anybody else on the Board unhappy. I was aware that the three Board members who left before me were forced out because each one of them had recommended clemency in one or more cases that got sent up to Governor Brewer. At least one Board member who had voted for clemency received a letter from the Governor's office informing him or her that the Governor was displeased with his or her vote. I know about this letter because one of the individuals who received one showed it to me.

4. The other members of the Board while I served were also aware that their predecessors had lost their jobs because of how they voted. I knew that it was possible that I too could lose my job as a result of how I voted, but this did not affect my votes. I simply made sure I was prepared to go at any time, in case I was dismissed. I never received any kind of letter expressing displeasure with any of my votes. However, even if I had, it would not have made a difference to me because, at the end of the day, what matters is that I act with honor and integrity.

5. On more than one occasion, Chairman Hernandez informed the Board members that Governor Brewer had been unhappy with one of our recent our decisions or that she would be unhappy if we voted a certain way in an upcoming case. Mr. Hernandez indicated that he was getting his information from the Governor's office. However, I was not concerned, and I voted as I thought was right. Mr. Hernandez did not sit on most of the cases we heard, but he did sit on most of the high-profile cases that came before us.

Signed this 16<sup>th</sup> day of September, 2013, in Maricopa County, Phoenix, Arizona.

A handwritten signature in black ink, appearing to read 'Melvin Thomas', written over a horizontal line.

Melvin Thomas



### Declaration of Jesse Hernandez

I, Jesse Hernandez, under penalty of perjury, state the following to be true and accurate to the best of my personal knowledge:

1. I served as Chairman and Director of the Arizona Board of Executive Clemency (the "Board") from April 19, 2012, until my resignation on August 16, 2013. I was appointed by Governor Brewer on April 3, 2012, and I swore my loyalty oath of office and was confirmed by the State Senate on April 19, 2012.

2. I was appointed to the Board by Governor Brewer at the same time that Melvin Thomas and Brian Livingston were appointed to the Board. We were appointed to succeed three outgoing members: Chairman Duane Belcher, Member Marilyn Wilkens, and Member Ellen Stensen.

3. The person who initially approached me about a position on the Board was Governor Brewer's Deputy Chief of Staff, Scott Smith. I interviewed with the Executive Clemency Nominating Committee at the end of March 2012, and was informed that I had been chosen by the Governor to serve as Chairman.

4. Soon after I took office, I learned that the Board is not independent from the Governor. Not long after I was sworn in, I was called to the first of several "come to Jesus" meetings with Scott Smith or other individuals representing Governor Brewer. Some of these meetings took place at the Governor's offices. Others took place at various non-office locations, including Starbucks. At this first meeting, Mr. Smith lectured me about Governor Brewer's policy to be tough on crime. He said, "We don't want another Macumber or Flibotte." I immediately understood this to mean that Governor Brewer was directing me not to recommend clemency in high-profile cases.

5. When Mr. Smith made this statement, I was well aware that "Macumber" referred to the high-profile case of Bill Macumber, who had served more than 30 years for a murder many people believed he did not commit. Previous boards voted twice to recommend that he receive clemency, and Governor Brewer twice denied his application. I was aware that the Governor received negative press as a result of her decisions and that Mr. Macumber's brother had complained so vocally at a television news conference that the Governor had been forced to shut it down. I was also aware that "Flibotte" referred to another case in which the previous Board had voted to commute a portion of a sentence of 90 years for offenses of downloading pornography. It was crystal-clear to me that Mr. Smith was telling me that, as the new

Chairman, I was expected to ensure that the Board not recommend clemency in particular kinds of cases, rather than voting according to our consciences.

6. I was also called to several more of these “come to Jesus” meetings with Smith or others from the Governor’s office over the next several months. The meetings coincided with high-profile cases that the Board was scheduled to decide. One involved the Tim Casner case, and another involved Betty Smithey. Again, Smith or the other member of the Governor’s staff would tell me the Governor’s philosophy that she must be tough on crime. I was also told that it was important to stay in line with these views “for the sake of the administration.” The clear implication was that we were not to vote for clemency in the upcoming case.

7. Another reason that the Governor’s message to me was so clear was that the rest of the Board and I were well aware that the three members of the previous Board had been ousted as a result of their pro-clemency votes in the Macumber or other cases. During my time on the Board, the other members understood clearly that they risked losing their jobs if they voted contrary to the Governor’s wishes and forced her to decide a case that she did not want to decide. For instance, I once mentioned to Ellen Kirschbaum that I noticed that she was “always a no” vote. She agreed and stated that the reason was that she would imagine, “What would the Governor think?”

8. Because the Board is not independent from the Governor and members are aware that their jobs are at stake, the Board will *never* vote for commutation of a death sentence. There is not even the tiniest sliver of hope that any death-row prisoner will ever get a majority vote recommendation for clemency. In December of 2012, death row prisoner Richard Stokley was scheduled to be executed. Mr. Stokley wrote the Board a letter stating that he declined to apply for clemency. He explained that he believed that a commutation hearing would be a waste of time because he knew that his application would automatically be turned down. Mr. Stokley had it right: it would be a waste of time for any death-sentenced prisoner to ask this Board for clemency.

9. A couple of months ago, Brian Livingston sent the Board an email to update us that death-row prisoner Edward Schad had received a stay of execution. I overheard members Kirschbaum, Thomas, and Livingston discussing Mr. Schad’s case in the break room. They all agreed that they would not be voting for clemency in his case. Ms. Kirschbaum said something similar to what she had told me before: “I could not put my name on that. What would the Governor think?”

Signed this 23 day of September, 2013, in Maricopa County, Phoenix, Arizona.

  
Jesse Hernandez





**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

EDWARD HAROLD SCHAD, JR.,

Plaintiff,

vs.

JANICE K. BREWER,  
Governor Of The State Of Arizona, In  
Her Official Capacity,

SCOTT SMITH,  
Chief Of Staff To Governor Brewer,  
In His Official Capacity

BRIAN LIVINGSTON,  
Chairman and Executive Director,  
Arizona Board of Executive Clemency

JOHN "JACK" LASOTA,  
Member, Arizona Board of Executive  
Clemency, In His Official Capacity

ELLEN KIRSCHBAUM,  
Member, Arizona Board of Executive  
Clemency, In Her Official Capacity

DONNA HARRIS,  
Member, Arizona Board of Executive  
Clemency, In Her Official Capacity

Defendants.

No. 2:13-cv-01962-ROS

**MOTION FOR A  
TEMPORARY  
RESTRAINING ORDER  
AND/OR PRELIMINARY  
INJUNCTION**

DEATH PENALTY CASE -  
EXECUTION SET FOR  
OCTOBER 9, 2013 10:00 AM

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Counsel for Petitioner Schad

Pursuant to Fed. R. Civ. P. 65,<sup>1</sup> Plaintiff, Edward Schad, by counsel moves this Court for a Temporary Restraining Order and/or Preliminary Injunction enjoining Defendants Livingston, LaSota, Kirschbuam and Harris from convening a reprieve/commutation hearing in his case and enjoining and/or staying any execution of Schad pending his being provided clemency proceedings that do not violate his rights to be free from cruel and unusual punishment, to equal protection under the law and to fundamental due process as guaranteed to him by the Eighth and Fourteenth Amendments of the United States Constitution. In support of his motion, Plaintiff states the following:

### **MEMORANDUM IN SUPPORT OF MOTION**

“[E]xecutive clemency exists to provide relief from harshness or mistake in the judicial system, and is therefore vested in an authority other than the courts.” *Ex parte Grossman*, 267 U.S. 87, 120-121 (1925). Justice O’Connor’s opinion in *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) explains the modern due process concerns for executive clemency:

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<sup>1</sup> Fed. R. Civ. P. 65(b)(1) contemplates that a party may obtain a TRO without first filing a written motion or giving notice to the opposing counsel. This motion is filed under exigent circumstances. Plaintiff’s complaint is supported by five declarations, all of which were only recently received. Plaintiff’s lead attorney resides in Nashville, Tennessee and is also primarily responsible for the appellate briefing in the related habeas matter pending in the Ninth Circuit Court of Appeals. To the extent that there are technical errors in drafting or the court seeks additional information, Plaintiff respectfully suggests that supplementation either orally at a hearing or in writing should be liberally granted.

A prisoner under a death sentence remains a living person and consequently has an interest in his life. The question this case raises is the issue of what process is constitutionally necessary to protect that interest in the context of Ohio's clemency procedures. It is clear that “once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly.” *Ford v. Wainwright*, 477 U.S. 399, 429, 106 S.Ct. 2595, 2612, 91 L.Ed.2d 335 (1986) (O'CONNOR, J., concurring in result in part and dissenting in part). I do not, however, agree with the suggestion in the principal opinion that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards. THE CHIEF JUSTICE's reasoning rests on our decisions in *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981), and *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). In those cases, the Court found that an inmate seeking commutation of a life sentence or discretionary parole had no protected liberty interest in release from lawful confinement. When a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished. But it is incorrect, as Justice STEVENS' dissent notes, to say that a prisoner has been deprived of all interest in his life before his execution. See *post*, at 1254–1255. Thus, although it is true that “pardon and commutation decisions have not traditionally been the business of courts,” *Dumschat*, *supra*, at 464, 101 S.Ct. at 2464, and that the decision whether to grant clemency is entrusted to the Governor under Ohio law, I believe that the Court of Appeals correctly concluded that some *minimal* procedural safeguards apply to clemency proceedings. **Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.**

*Id.* 523 U.S. at 288-89 (1998)(emphasis supplied).

This Court balances four factors in consideration of Plaintiff's motion: (1) whether the movant has a strong likelihood of success on the merits; (2) whether



the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) how the public interest would be affected by issuance of the injunction. On balance these factors favor Plaintiff's motion and counsel that this Court should temporarily enjoin Defendants from conducting a clemency/reprieve hearing and enjoin his execution until such time as this matter can be fully adjudicated.

I. Plaintiff Has a Strong Likelihood of Success on the Merits of His Complaint Which Is Supported with Declarations from Five Former Members of the Arizona Board Of Executive Clemency All of Whom Served Under Defendant Governor Brewer.

Plaintiff has filed a Complaint supported by sworn declarations from five former board members (including two former chairman), all of whom served during Defendant Brewer's Administration, which establish a *prima facie* case that Defendants Smith and Brewer have proactively tampered with the executive clemency process to such an extent that Schad cannot receive a full, fair, independent access to a clemency hearing. *Young v. Hayes*, 218 F.3d 850 (8<sup>th</sup> Cir. 2000) (granting interim relief based upon state official's deliberate interference with fundamentally fair clemency process). Two of the three current board members have already stated that they will not recommend clemency for Plaintiff. Attachment I to Complaint. Defendant Kirschbaum specifically voiced her

concern about repercussion from the Governor were she to vote favorably for Plaintiff. *Id.*<sup>2</sup>

The totality of the circumstances, as supported by sworn declarations, not mere conclusions or general accusations, establish that Plaintiff cannot obtain a fair clemency hearing.

Such conduct on the part of a state official is fundamentally unfair. It unconscionably interferes with a process that the State itself has created. The Constitution of the United States does not require that a state have a clemency procedure, but, in our view, it does require that, if such a procedure is created, the state's own officials refrain from frustrating it by threatening" or intimidating board members, from engaging in a mere farce of a clemency proceeding, and from violating governing law.

*Young*, 218 at 853 (8th Cir. 2000).

Here, as in *Young*, the conduct of Defendants “unconscionably interferes with a process that the State itself has created.” The circumstances show that no high profile inmate can or will receive a favorable recommendation by the Board which results in an absolute bar to clemency for any high profile inmate. Further, Plaintiff has shown that this absolute bar to clemency is likely to be applied specifically to him where the majority of qualified members have already stated

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<sup>2</sup> After the instant complaint was filed, and after she received email service of the same, Defendant Kirschbaum faxed a letter to undersigned counsel denying Schad’s request that she recuse herself from the upcoming hearing. Though the letter contains self-serving assurances that Defendant Kirschbaum is not biased against Plaintiff, noticeably absent is a denial of the conversation which was overheard by Declarant Hernandez. Defendant Kirschbaum’s letter is attached to this document as Attachment J.

that they will not vote in his favor based solely out of fear of professional repercussions. Such fears are not unfounded or speculative. Defendants Livingston, Kirschbaum, LaSota and Harris are familiar with the ousting of three board members by Defendant Governor Brewer, together with the actions of Defendant Smith acting as the Governor's agent. They are familiar with Defendants Smith's admonitions to not vote in favor of clemency "for the sake of the administration."

"Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 411-412 (1993). In Arizona, the legislature enacted the clemency board for the purpose of creating a check on gubernatorial discretion and to add an extra layer of impartiality, fairness and due process. Defendant Brewer and Defendant Smith's behind-the-scenes-arm-twisting and overtly retaliatory actions toward former board members have destroyed any semblance of fairness or impartiality in defiance of legislative intent, and most importantly for Plaintiff, deprive him of due process and equal protection of the laws.

Where clemency is then a "court of last resort" and the only means by which an man – like Edward Schad, who has acted with extreme respect for authority and and as a model inmate all the while proclaiming his innocence – can preserve his

very life, due process requires the balancing of the interests of the Plaintiff, the interests of society, the contribution of the requested procedure to accurate truthfinding, and the risk of erroneous deprivation if the procedure is not adopted. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *See also Brock v. Roadway Express*, 481 U.S. 252, 261, 107 S.Ct. 1740, 1747 (1987), *citing Goldberg v. Kelly*, 397 U.S. 254, 66-271, 90 S.Ct. 1011, 1019-1033 (1970) (“Depending on the circumstances, and the interests at stake, a fairly extensive evidentiary hearing may be constitutionally required before a legitimate claim of entitlement may be terminated.”).

This case presents precisely the rare, yet arbitrary interference with clemency that *Woodard* was designed to prevent. If due process countenances such political machinations and intimidation to allow a man to be executed with no meaningful access to the state's clemency process, then *Woodard* has been rendered absolutely meaningless. If a flip of a coin violates due process under *Woodard*, certainly the Governor and the Board's use of weighted dice which always come up "denied" likewise violates due process. Schad has pleaded and shown that the process is fraudulent, and due process under *Woodard* does not countenance the intimidation and fraud which is occurring here. The court could so conclude upon deciding this case on the merits.



The clemency process as it currently stands does not afford Plaintiff even the barest due process. Sworn statements by *all five of the most recent* members of the Clemency Board, including *both of its two Chairpersons*, establish that the individuals constitutionally entrusted to decide whether Mr. Schad will live or die operate under the constant fear of losing their jobs if their vote displeases Governor Brewer. These declarations show that it is crystal-clear to the Board what vote will displease Governor Brewer: those in favor of clemency in high-profile or controversial cases, just like Plaintiff's. Ex-Chairman Hernandez swore that he was called to repeated off-site "come to Jesus" meetings with Defendant Smith and told how to vote in multiple cases, and ex-member Thomas in turn swore that Hernandez conveyed these sentiments to the other board members, including those who currently sit. Two of the three members currently slated to make recommendations to the Governor whether Mr. Schad should receive mercy have already illegally discussed his fate and decided that they would vote "no." One of these members specifically stated that her vote against Mr. Schad was a direct result of her fear of the Governor. These facts establish that not only Board members operate out of fear rather than neutrality, and that the Board's constitutional independence is a sham, but that no death-row inmate will *ever* have an opportunity for a fair clemency process in Arizona as it currently operates.

Arizona's scheme cannot supply Plaintiff even the minimal constitutional due process to which he is entitled. Plaintiff is entitled to a neutral Clemency Board.

To put Plaintiff's situation in perspective consider that a person whose car is being repossessed is entitled to a neutral judge. *See Fuentes v. Shevin*, 407 U.S. 67 (1972). A person who is being tried for a traffic offense is entitled to a neutral judge. *Ward v. Monroeville*, 509 U.S. 57 (1972). If neither property nor liberty can be taken in the absence of a neutral arbiter, surely Plaintiff's life cannot. The decision to grant or deny clemency in a death penalty cases must comply with the Eighth and Fourteenth Amendments. *Woodard*, at 290-92. A "minimum requirement of due process" is a "neutral and detached hearing body." *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Porter v. Singletary*, 49 F.3d 1483, 1487 (11<sup>th</sup> Cir. 1995). Although the parameters of the minimal due process requirements of *Woodard* is unclear, what is crystal clear is this Court's longstanding recognition that the cornerstone of constitutional due process – whether it is "minimal" due process, "regular" due process, or "heightened" due process – is a "fair and impartial tribunal," *Porter v. Singletary*, 49 F.3d 1483, 1487 (11<sup>th</sup> Cir. 1995), *citing and quoting, Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. ... The

neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.”).

The Supreme Court has invalidated any number of deliberative systems involving protected liberty, property or life interests as violative of due process where the decision-maker was compromised by monetary influence, personal or institutional interest, or other indicia of bias or lack of appearance of neutrality and fairness. *See e.g., Connally v. Georgia*, 429 U.S. 245 (1977) (justices of the peace being paid for issuance but not for non-issuance of search warrants); *Taylor v. Hayes*, 418 U.S. 488 (1974) (judge who had previously held defendant in contempt); *Gibson v. Berryhill*, 411 U.S. 564 (administrative board consisting of optometrists in private practice hearing charges filed against optometrists competing with board members); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (prohibiting parole officer from making determination whether parole was violated).

Moreover, the United States Supreme Court has emphasized time and again that the concept of a fair and impartial decision-maker applies with equal force to administrative proceedings as it does to criminal and civil judicial proceedings. In *Withrow v. Larkin*, 421 U.S. 35 (1975), the Supreme Court dealt with the issue of a physician challenging a medical board’s dual investigative and adjudicatory functions. Although the Supreme Court held that the board’s dual function did not

present such a conflict that would warrant the granting of a temporary restraining order, the Court set forth the following explanation of the basic fairness requirement:

Concededly, a ‘fair trial in a fair tribunal is a basic requirement of due process.’ [] This applies to administrative agencies which adjudicate as well as to courts. [] **Not only is a biased decisionmaker constitutionally unacceptable but ‘our system of law has always endeavored to prevent even the probability of unfairness.’** [] In pursuit of this end, various situations have been identified in which experience teaches that the **probability of actual bias** on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

*Id.* at 46-47 (emphasis added). The *Withrow* Court went on to hold that the claim failed because “there was no evidence of bias or the risk of bias or prejudgment” and that the board’s procedures do not in and of themselves contain “an unacceptable risk of bias.” *Id.* at 54. Unlike the threats to job security and overt interference in the voting at issue in Mr. Schad’s case, “no specific foundation ha[d] been presented for suspecting that the [b]oard had been prejudiced.” *Id.*

A clemency decision-maker who is motivated by “politics,” “personal” considerations, or “political affiliation” would violate due process. *Woodard, supra*, 523 U.S. 272, 290-92 (1998)(Justices Stevens, concurring in part and dissenting in part); *see also id.*, 523 U.S. at 289 (O’Connor, J., joined by Souter, J., Ginsburg, J., and Breyer, J., concurring). Surely the state decision-makers in this case, who are appointed by the Governor to the Clemency Board, and who are



compromised their status as voting under threat of job loss; as irrevocably biased against a particular prisoner; or as direct fear of the Governor's opinion have such impermissible personal and political motivations, whether consciously or subconsciously, they cannot be permitted to decide Mr. Schad's case. Even the most minimum standards of due process must have a fair and impartial decision-maker to give them affect.

A fundamental tenet of constitutional due process is a "fair and impartial tribunal," *Porter v. Singletary*, 49 F.3d 1483, 1487 (11<sup>th</sup> Cir. 1995), *citing and quoting Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. ... The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law."). The Court has invalidated any number of deliberative systems involving protected liberty, property or life interests as violative of due process where the decision-maker was compromised by monetary influence, personal or institutional interest, or other indicia of bias or lack of appearance of neutrality and fairness. *See e.g., Connally v. Georgia*, 429 U.S. 245 (1977) (justices of the peace being paid for issuance but not for non-issuance of search warrants); *Taylor v. Hayes*, 418 U.S. 488 (1974) (judge who had previously held defendant in contempt); *Gibson v. Berryhill*, 411 U.S. 564 (administrative board consisting of

optometrists in private practice hearing charges filed against optometrists competing with board members); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (prohibiting parole officer from making determination whether parole was violated).

In the context of clemency proceedings, the Due Process Clause of the Fourteenth Amendment to United States Constitution guarantees Mr. Schad the modest right to at least minimal due process and procedural safeguards to protect his interest in life. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 118 S.Ct. 1244, 1250 (opinion as to section I, and judgment of the Court, by Rehnquist, C.J.) *Id.* at 289 (O'Connor, J. concurring). A right to a fair and impartial tribunal, and, equally as important, the perception of such, is ingrained in the Due Process clause of the United States Constitution. Basic and minimal due process requirements include “an ‘impartial’ decisionmaker.” *Mathews v. Eldridge*, 424 U.S. 319, 325 n.4 (1975) (citing *Goldberg v. Kelly*, 397 U.S. 254 (1971)). *See also*, *Woodard*, 523 U.S. at 290-91 (Stevens, J., concurring in part and dissenting in part) (recognizing that “minimal” due process safeguards would be violated by clemency procedures infected by bribery or political animosity). It is especially critical that executive clemency proceedings afford condemned prisoners like Mr. Schad both the appearance and reality of reliability, impartiality and due process because:

[e]xecutive clemency has provided the “fail safe” in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.

*Herrera v. Collins*, 506 U.S. 390, 415 (1993). The system to which Plaintiff is subjected is far worse than the example condemned by Justice O’Connor in *Woodard*: for Plaintiff a flip of the coin gives him a chance of a favorable result. Defendant’s actions have created a clemency proceeding wherein the Board has already avowed not to grant clemency and where the members are bullied to vote in accordance with the interests of the administration.

II. Plaintiff Will Suffer Irreparable Harm, *Viz*, the Denial of Access to Full, Fair, and Independent Clemency Hearing Absent A Temporary and/or Preliminary Injunction.

It is unquestionable that the value of a human life is inestimable and that Plaintiff’s right to life – like the right to life possessed by all persons – is the fundamental human right. This fact alone makes clear that any questions about the fairness of the process must be resolved strictly in favor of Plaintiff.

Where clemency is the final opportunity for Plaintiff to plead his case of innocence (a plea which the procedural technicalities of habeas foreclose) and to plead the unjustness of his sentence free from the shackles of procedural default and AEDPA deference, it is unconscionable to force him to do so in front of board

so clearly tainted. It is not just the appearance of due process that Plaintiff is entitled to, but actual due process. Plaintiff is entitled to one fair opportunity to fully and completely make his case that he did not murder Lorimer Grove and that he is a person of good moral character who suffers from a debilitating illness which is largely under control, that he is not a threat to society and that he is far from the worst of the worst. To deny him that opportunity for arbitrary and capricious political platitudes such as a Defendant's desire to appear tough on crime while at the same time not wanting to be placed in the position of actually having to make those choices is beyond the pale and violates even the most minimal standards of due process.

### III. No One Will Be Harmed by A Temporary and/or Preliminary Injunction

Mr. Schad is a seventy-one year old model inmate who has already served the equivalent of a life sentence for a crime he has steadfastly denied for thirty-five years. His 1979 conviction was unconstitutional and reversed. He was retried in 1985. The United States Supreme Court accepted review of that decision and upheld it by the smallest of margins 5-4.<sup>3</sup> This Court stayed his habeas case twice, first because the Court ruled that it would not consider procedural defenses in light

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<sup>3</sup> It is widely accepted that had Justice Souter heard Mr. Schad's case later in his term of service his vote would have been different.



of the 9<sup>th</sup> Circuit decision in *Robert Smith v. Schriro* and then when the Court refused to apply *Ring v. Arizona* retroactively.<sup>4</sup>

Defendants will undoubtedly claim that any delay will prejudice the state's interest in finality. But it is important to note that it is the State that created this situation, through Defendant Brewer and her agent Defendant Smith. The interest in finality is not great where it is the misconduct of State officials which give rise to the complaint and where Plaintiff has already been effectively punished by a life sentence and will continue to be punished through harsh conditions of confinement.<sup>5</sup> Plaintiff merely seeks a fair opportunity to plead his case for sentence commutation in front of a fair and unbiased board. He seeks due process of law and equal protection of the law that is guaranteed to him as a citizen of the United States.

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<sup>4</sup> In yet another cruel twist of fate for Mr. Schad, he raised the Ring issue before *Walton v. Arizona* was decided. At the time he raised the issue, the Ninth Circuit had ruled in *Adamson* that capital defendants weren't entitled jury trials. But the Arizona courts refused to follow the Ninth Circuit. The Supreme Court agreed with the Arizona Supreme Court in *Walton* and then reversed *Walton* in *Ring*. By then, it was too late for Schad to get relief, even though his capital sentence was plainly obtained in violation of the United States Constitution. But because he was prescient in his legal arguments, he was denied the benefit of the application of the correct law to his case.

<sup>5</sup> Courts must "consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). Here, Plaintiff has not created the delay. The change in board members only occurred in August, and Plaintiff only recently learned the reasons behind those changes. The declarations were obtained this very week. Plaintiff should not be punished by Defendants' secretive actions.

#### IV. The Public Interest Lies in Granting A Temporary and/or Preliminary Injunction

The Public Interest is in favor of a full airing of the instant complaint which cannot happen in a few short weeks. Defendants will no doubt respond with general denials of the allegations in the complaints. But such self-serving denials cannot justify the denial of Plaintiff's motion. The public interest is in permitting the complaint to continue along an expedited path of discovery (including depositions of the parties and requests for production of documents) followed by a bench trial.

Moreover, the legislature has determined that the public's interest is in the Board acting as a check on the Governor's power. If, as Plaintiff alleges, the Defendants acted to defeat that interest, then the public interest clearly lies in favor of a temporary restraining order and/or preliminary injunction.

Finally, the public interest is served by enforcing constitutional rights. *Preminger v. Principi*, 422 F.3d, 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.").

The conduct of Defendants "unconscionably interferes with a process that the State itself has created." *Young*, 218 F.3d at 853. To deny Plaintiff's motion is

to countenance the actions of Defendants Brewer and Smith and the impact of those actions on the remaining Defendants.

WHEREFORE, the motion should be granted.

Respectfully submitted this 27<sup>th</sup> day of September, 2013.

Kelley J. Henry  
Supervisory Asst. Federal Public Defender  
Denise Young, Esq.

By *s/Kelley J. Henry*  
Counsel for Plaintiff Edward Schad

### **Certificate of Service**

I hereby certify that on September 27, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona. I also certify that I emailed a copy of the same to counsel, Kelly Gibson as well as to Mr. Jeffrey Zick and Mr. Jon Anderson, Assistant Attorneys General. I further certify that I emailed copies to Ms. Kristine Fox, Capital Case Staff Attorney for the District of Arizona and Ms. Margaret Epler, Capital Case Staff Attorney for the Sixth Circuit.

Kelley J Henry

Counsel for Edward Schad





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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Edward Harold Schad, Jr.,	)	No. CV-13-01962-PHX-ROS
Plaintiff,	)	<u>DEATH PENALTY CASE</u>
vs.	)	<b>ORDER</b>
Janice K. Brewer, et al.,	)	
Defendants.	)	

Plaintiff has moved for a temporary restraining order and a preliminary injunction to enjoin certain Defendants “from convening a reprieve/commutation hearing in his case.” (Doc. 6 at 3). Plaintiff also seeks a stay of his execution. In his civil rights complaint, Plaintiff alleges that Defendants have created a clemency process that is arbitrary and capricious, in violation of the Eighth and Fourteenth Amendments. Plaintiff further claims that Defendants’ failure to comply with Arizona’s open meetings law violates his rights under the Eighth and Fourteenth Amendments. Finally, Plaintiff alleges that Defendants conspired to deprive “high-profile inmates” access to executive clemency, in violation of the equal protection clause of the Fourteenth Amendment and, for death row inmates, the Eighth Amendment.

Because Plaintiff’s execution is scheduled to take place on Wednesday, October 9, 2013, the Court finds good cause to order expedited briefing and an evidentiary hearing on

1 Plaintiff's motion. If, when filing their opposition to Plaintiff's motion, Defendants wish to  
2 dispute the factual accuracy of the information set forth in the complaint and accompanying  
3 documents, the opposition should be accompanied by appropriate affidavits. Moreover,  
4 Defendants should be prepared to present live testimony at the evidentiary hearing. The  
5 hearing may be vacated or rescheduled upon a review of Defendants' submissions.

6 Accordingly,

7 **IT IS ORDERED** that Defendants shall file a response to Plaintiff's Motion for  
8 Temporary Restraining Order or a Preliminary Injunction no later than **9:00 a.m. on**  
9 **Monday, September 30, 2013**. Defendants' response should be accompanied by the  
10 appropriate affidavits and should indicate whether Defendants are willing to reschedule  
11 Plaintiff's reprieve/commutation hearing for a date later than October 2, 2013, but prior to  
12 October 9, 2013. The response should also indicate which Defendants are available to testify  
13 on September 30, 2013, at 2:00 p.m. No reply is permitted absent further order of the Court.

14 **IT IS FURTHER ORDERED** that a hearing on Plaintiff's motion will be held on  
15 **Monday, September 30, 2013, at 2:00 p.m. in Courtroom 604**.

16 **IT IS FURTHER ORDERED** that the Clerk of Court shall forthwith email a copy  
17 of this Order as well as Plaintiff's Complaint for Equitable, Injunctive and Declaratory Relief  
18 (Doc. 1) and Plaintiff's Motion for Temporary Restraining Order or a Preliminary Injunction  
19 (Doc. 6), to Joseph Sciarrotta, Jr., General Counsel, Office of the Governor  
20 (jscarrotta@az.gov); Kelly Gillilan-Gibson, Assistant Arizona Attorney General, Arizona  
21 Board of Executive Clemency (kelly.gillilan-gibson@azag.gov); and Brian Luse, Assistant  
22 Arizona Attorney General, Arizona Board of Executive Clemency (brian.luse@azag.gov).

23 DATED this 27th day of September, 2013.

24  
25 

26 Roslyn O. Silver  
27 Senior United States District Judge  
28

THOMAS C. HORNE  
Attorney General  
(Firm State Bar No. 14000)

Kelly Gillian-Gibson  
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Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

<p>EDWARD HAROLD SCHAD, JR.,</p> <p>Plaintiff,</p> <p>v.</p> <p>JANICE K. BREWER, Governor Of the State of Arizona in Her Official Capacity,</p> <p>SCOTT SMITH, Chief of Staff to Governor Brewer, In His Official Capacity</p> <p>BRIAN LIVINGSTON, Chairman and Executive Director, Arizona Board of Executive Clemency</p> <p>JOHN "JACK" LASOTA, Member, Arizona Board of Executive Clemency, In his Official Capacity</p> <p>ELLEN KIRSCHBAUM, Member, Arizona Board of Executive Clemency, In Her Official Capacity</p>	<p>Case No. 2:13-cv-019162-ROS</p> <p><b>RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION</b></p> <p><b>CAPITAL CASE</b></p> <p><b>EXECUTION SET FOR OCTOBER 9, 2013</b></p>
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DONNA HARRIS, Member, Arizona Board of Executive Clemency, In Her Official Capacity,  Defendants.	
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Defendants Governor Janice K. Brewer, Chief of Staff, Scott Smith, Chairman/Executive Director of the Arizona Board of Executive Clemency, Brian Livingston, Board Member, John “Jack” LaSota, Board Member Ellen Kirschbaum, and Board Member Donna Harris oppose Plaintiff Edward Schad’s Motion for a Temporary Restraining Order and/or Preliminary Injunction in which Schad complains that the Board has an alleged bias against him and as a result of that alleged bias would not vote to recommend clemency.

The Arizona Board of Executive Clemency (“Board”) is ready to conduct the clemency hearing for Mr. Schad on October 2, 2013. Board members Brian Livingston, Ellen Kirshbaum, John LaSota and former Board member Melvin Thomas will be present at the evidentiary hearing scheduled for September 30, 2013 at 2:00 p.m. The current Board members plus Melvin Thomas are available to testify and will dispute the allegations asserted by Schad.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **SUMMARY OF RELEVANT FACTS**

On August 9, 1978, a badly decomposed body of an elderly male was found approximately nine miles south of Prescott, Arizona, adjacent to a roadway pull-off on U.S. Highway 89. After the corpse was discovered, the Yavapai County Sheriff’s Department and the County Medical Examiner observed a small rope tied around the victim’s neck. It was later established that the cause of death was strangulation. In 1985, an Arizona jury found respondent guilty of first-degree murder for the 1978 strangling of

74-year-old Lorimer Grove. The court sentenced respondent to death.

After 28 years of litigation, a warrant of execution was issued and Mr. Schad was scheduled for a reprieve/commutation hearing on February 27, 2013. On the evening prior to the scheduled reprieve/commutation hearing, Ms. Henry sent an e-mail to Director Ryan of the Arizona Department of Corrections declining to participate in the clemency process due to a decision in the 9<sup>th</sup> Circuit Court of Appeals.

Once again, Schad has exhausted his legal remedies and the Arizona Supreme Court issued another warrant of execution which is scheduled for October 9, 2013. Despite the fact that Mr. Schad previously declined to participate in his commutation hearing, the Board has scheduled a clemency hearing for October 2, 2013. The Board is prepared to hold the clemency hearing on October 2, 2013.

### **LEGAL AUTHORITY AND ARGUMENT**

#### **1. Schad will not prevail on the merits because there is no evidence that the Board is biased.**

Schad's unsubstantiated claims about current Board members do not meet the standard for the issuance of a temporary restraining order or preliminary injunction. A preliminary injunction is “an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)

The Ninth Circuit has established two tests for determining whether to grant a preliminary injunction. Under the traditional test, the court considers (1) the likelihood that the moving party will prevail on the merits; (2) whether the moving party will suffer irreparable injury if the court denies relief; (3) whether the balance of potential harm favors the moving party; and (4) whether the public interest favors the moving party (in certain cases). *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9<sup>th</sup> Cir. 2005). Under the second, alternative test, the court considers “*either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are

raised and the balance of hardships tips sharply in [plaintiff's] favor.” *Id.* at 1120 (emphasis in original).

Schad will not prevail on the merits of his complaint because he has not and cannot make a clear showing that the current Board members are biased against him. Jesse Hernandez is the only declarant that alleges that the Board members have engaged in prohibited acts including open meeting law violations and skirting their responsibilities to act independently. *See* Compl. at Ex I. Mr. Hernandez is a disgraced and disgruntled former board member and his allegations are false and should be disregarded. *See* Ex. A. Mr. Hernandez resigned his position as Executive Director and Chairman of the Board after a state investigation substantiated nine allegations that he engaged in inappropriate and unprofessional acts. *Id.* Mr. Hernandez seemingly has a prejudice against his former employer and a motivation behind his misstatements. Jesse Hernandez’s bald allegations, that the Board illegally discussed Schad’s case is insufficient to show “bias” and “prejudice” let alone establish a basis for a temporary restraining order.

Mr. Hernandez’s veracity and credibility should be questioned. For example, Mr. Hernandez’s swears under penalty of perjury that he overheard or participated in a conversation with three Board members discussing how they would vote on Mr. Schad’s case. *Id.* Mr. Hernandez’s ‘overhearing’ this alleged conversation constitutes a violation of Arizona open meeting laws as he would be participating in that alleged meeting. As Executive Director of the Board, he has had extensive training on Arizona’s opening meetings laws. Further, if Mr. Hernandez truly had witnessed Board members engaging in activities that violated Arizona law, as Executive Director and Chairman, he would have an obligation to report it. Mr. Hernandez never reported any open meeting violations.

Additionally, Mr. Hernandez was the only Board member to have been found by the state’s investigation to have engaged in misconduct when he accepted basketball tickets from an inmate’s step-brother during a time the Board was considering his

commutation. The Court cannot ignore these examples when weighing the credibility of his statements. Mr. Hernandez's statements have less credibility when viewed with the categorical denial of Melvin Thomas, Brian Livingston and Ellen Kirshbaum. *See* Exs. B, C, and E.

**2. Board Members will conduct Schad's clemency hearing in a fair and impartial manner.**

Defendant Board members and former Board member Melvin Thomas deny having a discussion in violation of Arizona Law regarding how they would vote on Schad's request for clemency. *See* Exs B, C, D, E, affidavits dated September 30, 2013 from current Board members Brian Livingston, Ellen Kirschbaum, John LaSota and former Board member Melvin Thomas. There is a presumption of honesty and integrity of those serving as adjudicators; to show disqualifying prejudgment, a claimant must demonstrate that the decision maker's mind is irrevocably closed on the particular issue being decided. *See, Havasu Heights v. Desert Valley Wood Products*, 167 Ariz. 383, 387, 807 P.2d 1119, 1123 (App. 1990). "Without a showing of actual bias or prejudice, the members of [an administrative board] are presumed to be fair." *Lathrop v. Arizona Bd. Of Chiropractic Examiners*, 182 Ariz. 172, 180, 894 P.2d 715, 723 (App. 1995). In the absence of a showing that the decision maker is not "capable of judging a particular controversy fairly on the basis of its own circumstances," the decision maker cannot be disqualified. *Hortonville Joint School District No. 1. v. Hortonville Education Association*, 426 U.S. 482, 493, 96 S. Ct. 2308, 2314 (1976). The current Board members absent any credible evidence must be presumed by this Court to be fair and unbiased.

Schad realizing that he cannot make a case based on Mr. Hernandez's statements, attempts to confuse this court by filing numerous declarations from former Board members complaining that the Governor was allegedly not happy with the way they had



voted in certain cases. *See* Compl. at Exs E, F and G. Schad then extrapolates from that and argues the Governor and/or her staff has allegedly attempted to manipulate the clemency process.<sup>1</sup> The Governor has the authority to appoint new members to the Board and a public officer does not have a property or contract right to compel his or her continuation in office. *Ahearn v. Bailey*, 104 Ariz. 250, 254 (1969). Past Board members' beliefs and/or perceptions of why they were not re-appointed does not prove that the current Board has the same perceptions or that they will act improperly in performing their duties. Former Board members Belcher, Wilkins and Stenson's declarations are noticeably void of any evidence demonstrating bias or prejudice by the current Board members in the pending Schad clemency hearing. *Id.* Furthermore, the current Board members in their affidavits explicitly state that they have not been told how to vote, that job security is not a consideration in their vote and that they exercise independence in voting. *See* Exs B, C, D and E.

The current Board is prepared to proceed with the scheduled reprieve/commutation hearing and provide Schad with the appropriate due process. Arizona's reprieve/commutation process satisfies due process in that it provides an automatic hearing upon a receipt of a warrant of execution and provides the defendant with an opportunity to present mitigating or extenuating evidence showing that clemency is appropriate. *McGee v. Arizona State Board of Pardons and Parole*, 92 Ariz 317, 376 P.2d 779 (1962). Courts only address claims relating to clemency upon a showing that an inmate has been denied minimal due process, which has been defined as an opportunity to present reasons clemency should be granted and a decision maker who does not act in a completely arbitrary and capricious manner. *Id.* at 289 (plurality opinion)(O'Connor,

<sup>1</sup> Ms. Henry unsuccessfully argued that the current Board was biased in *State v. Lopez*, Arizona Supreme Court Number CR-90-0247-AP. In *Lopez*, the Supreme Court of Arizona rejected all bias claims. Attached as Ex F.

J., concurring in part and concurring in the judgment). Contrary to Schad's assertion that this is the last chance for him to prove his innocence, clemency proceedings are not "an integral part of the . . . system for finally adjudicating the guilt or innocence of the defendant". *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 285 (1998). Clemency proceedings are purely a matter of "grace". *Id.*

### **3. Schad Has Not Demonstrated Irreparable Harm**

Schad has not shown that he will suffer irreparable harm if the Court fails to grant the temporary restraining order. Based on the affidavits of the current Board members, any argument that a clemency hearing would be futile is not supported by the evidence. There is no credible evidence on how the Board will vote or that the Board engaged in any other improper activities. Likewise, Schad's argument fails in that it is in the public's interest for the Board to hear evidence to determine whether Schad should be recommended clemency.

Schad's argument misconstrues the basic function of clemency. It is in the public's interest not to have these proceedings delayed based on challenges to the composition of the Board based on the political appointment process. To its illogical conclusion, Schad's argument is that every appointed Board member must be biased simply because they were appointed. Entering a TRO in this case will preclude the Board from administering required statutory duties.

For all the reasons discussed above, Schad's argument does not pass the second, alternative test for preliminary injunctive relief. Schad has no reasonable chance of success on the merits and there is no irreparable harm in having these Board members hold the requested clemency hearing.

## CONCLUSION

Schad's only pertinent argument for the granting of the temporary restraining order is predicated on the statements of Mr. Hernandez. As previously argued, Hernandez's allegations against the Board are baseless and therefore, Schad cannot meet the standard required for this Court to issue a temporary restraining order.

Dated this 30<sup>th</sup> day of September, 2013.

THOMAS C. HORNE  
Attorney General

By: /s Kelly Gillian-Gibson  
Kelly Gillilan-Gibson  
Brian P. Luse  
Attorneys for Defendants

Electronically filed this  
30<sup>th</sup> day of September, 2013 with:

Clerk of the U.S. District Court  
for the District of Arizona  
401 W. Washington  
Phoenix, Arizona 85003

**COPY** of the foregoing served  
Electronically this  
30<sup>th</sup> day of September, 2013

Denise Young, Esq.  
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Federal Public Defender  
Middle District of Tennessee

810 Broadway, Ste. 200  
Nashville, TN 37203  
Attorneys for Plaintiff

By: Kelly Gillilan-Gibson  
3558447



# Exhibit A



Janice K. Brewer  
Governor

Brian McNeil  
Director

## ARIZONA DEPARTMENT OF ADMINISTRATION

### HUMAN RESOURCES DIVISION

100 NORTH FIFTEENTH AVENUE • SUITE 261  
PHOENIX, ARIZONA 85007  
(602) 542-5482

### COMPLAINT INVESTIGATION Arizona Board of Executive Clemency August 6, 2013

#### BOARD INTRODUCTION:

In 1913 The Board of Pardons and Paroles was established and functioned as the state's discretionary releasing mechanism for inmates. In 1993, Legislation passed which eliminated Board releases for inmates whose offenses were committed after January 1, 1994. As part of this legislative change, the Board of Pardons and Paroles was renamed the Arizona Board of Executive Clemency (Board).

The mission of the Arizona Board of Executive Clemency is to ensure public safety by considering and granting parole to eligible inmates who meet the legal criteria for a grant of parole. The Board also recommends certain clemency actions to the Governor. Each month the Board conducts parole hearings for inmates who have committed offenses prior to January 1994. Parole hearings include consideration for home arrest, work furlough, rescission, modification, revocation, and absolute discharge. The Board also conducts clemency hearings, which include commutations, pardons and reprieves.

The Board consists of four Board Members and a Chairman. The Board Members serve five year terms and the Chairman serves a two year term; all are appointed by the Governor. The Board also has six full-time employment positions; five are filled, one was vacated by the complainant on May 31, 2013.

#### BACKGROUND OF COMPLAINT:

On May 16, 2013, [REDACTED] with the Board of Executive Clemency, submitted a formal complaint to the Governor's Office of Equal Opportunity. In her complaint she alleged sexual harassment, retaliation, and discrimination based on age, color, national origin, pregnancy, and race. The allegations were against the Board Director - Jesse Hernandez, and [REDACTED], Human Resources Officer in the Arizona Department of Administration (ADOA) Human Resources Division, and [REDACTED], Human Resources Program Administrator in the Governor's Office of Equal Opportunity, conducted an investigation into [REDACTED] allegations.

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August 6, 2013  
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**Research Conducted:**

1. Investigative Interviews
2. Review of personnel action documentation, emails, agendas and memorandums relevant to alleged events
3. Statutes related to hearings

**Persons Contacted:**

- [REDACTED]
- Jesse Hernandez, Chairman/Executive Director
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

**Complainant's Employment History:**

[REDACTED] was hired by the Arizona Board of Executive Clemency as an uncovered [REDACTED] on November 5, 2012. On January 31, 2013, [REDACTED] received a memorandum of concern for failing to respect the chain of command (Exhibit One). On April 17, 2013, [REDACTED] received a memorandum advising her she was being reassigned to a different position and would be evaluated in two weeks to determine if she would remain in the position (Exhibit Two). On May 31, 2013, [REDACTED] resigned her position with the agency.

**ALLEGATIONS AND FINDINGS:**

**Allegation One**

[REDACTED]

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[REDACTED]

**Finding Allegation One**

This allegation is inconclusive.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Allegation Two**

[REDACTED]

[REDACTED]



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August 6, 2013  
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[REDACTED]  
[REDACTED]

**Finding Allegation Two**

This allegation is inconclusive.

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**Allegation Three**

[REDACTED] alleged that on April 8, 2013, [REDACTED] asked Mr. Hernandez if she could attend a hearing at the Lewis Prison with [REDACTED]. [REDACTED] had already asked [REDACTED] if she could attend the hearing with him and [REDACTED] stated it was fine. Mr. Hernandez advised [REDACTED] that it was fine for her to attend but he would talk to [REDACTED] and get back to [REDACTED]. Later, Mr. Hernandez told [REDACTED] that [REDACTED] did not want [REDACTED] to attend the hearing.

**Finding Allegation Three**

This allegation is substantiated.

[REDACTED] had requested to attend a hearing with the Board Members at the prison facility. Mr. Hernandez had stated this was fine. In response, [REDACTED] sent Mr. Hernandez an email about the hearing and indicated he was fine with [REDACTED] attending the hearing. Mr. Hernandez called [REDACTED] into his office and advised [REDACTED] that [REDACTED] was promiscuous and was trying to entice him. Mr. Hernandez stated that [REDACTED] is smart and attractive and has ways to get people to do things. [REDACTED] stated he has not seen [REDACTED] be anything other than professional and appropriate.

The following day Mr. Hernandez told [REDACTED] that [REDACTED] said he is uncomfortable with [REDACTED] because she comes into his office uninvited and talks to him. Mr. Hernandez stated to [REDACTED] that [REDACTED] is worried people will think he and [REDACTED] are dating. [REDACTED] denies making these comments to Mr. Hernandez or stating he did not want [REDACTED] to attend hearings.

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**Allegation Four**

[REDACTED]

**Finding Allegation Four**

This allegation is inconclusive.

[REDACTED]

[REDACTED]

[REDACTED]

**Allegation Five**

[REDACTED] alleged that Mr. Hernandez and [REDACTED] are dating and that [REDACTED] was promoted to the [REDACTED] position due to the dating relationship. [REDACTED] indicated that [REDACTED] is not qualified for the [REDACTED] position and that [REDACTED] received a substantial pay increase with the promotion.

**Finding Allegation Five**

This allegation is substantiated.

Mr. Hernandez and [REDACTED] deny ever dating or being involved in a sexual relationship. Both admitted to frequently attending happy hour together and both confirmed that they occasionally attend each other's family gatherings. Mr. Hernandez stated that he and [REDACTED] also occasionally carpool to and from work. However, [REDACTED] stated they have only carpooled once when Mr. Hernandez's vehicle was in the shop. [REDACTED] denies any other carpool incidents.

All four employees, four Board Members, and three Victims' Services employees believe Mr. Hernandez and [REDACTED] are in a relationship. All have based their opinion on personal observation rather than hear say. The majority of interviewees stated that they frequently see Mr. Hernandez and [REDACTED] arrive at work and leave at the end of the day in the same vehicle. [REDACTED] stated that for a three month period between January and March of 2013, the Board was temporarily located in an ADC building while the Board office was being remodeled. During this period [REDACTED] stated that she personally saw Mr. Hernandez and [REDACTED] arrive and leave in the same vehicle 80 percent of the days they were in the temporary building. [REDACTED]

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 August 6, 2013  
 Page 6 of 15

also stated that most every day Mr. Hernandez and [REDACTED] brought in the same leftovers in identical Tupperware or both have leftovers from the same restaurant.

Every employee questioned stated that Mr. Hernandez and [REDACTED] are very comfortable and familiar with each other and act like a couple. When they speak to each other they are in very close proximity to each other, and touch each other's arm, shoulder, hair, etc. Each interviewee stated that they are both very personally affected by the other's moods and seem to "get under the other's skin, in a way that only your significant other could do."

An ADC employee, [REDACTED], stated that she has personally seen numerous interactions between Mr. Hernandez and [REDACTED] because her office window faces the parking lot. [REDACTED] has witnessed Mr. Hernandez give [REDACTED] a kiss when she got out of the vehicle one morning when Mr. Hernandez and [REDACTED] arrived at work in the same vehicle. She has also seen Mr. Hernandez play with [REDACTED] hair through the car window and seen [REDACTED] give Mr. Hernandez play slaps.

[REDACTED], also from Victims' Services, stated that he has seen Mr. Hernandez play with [REDACTED] hair on several occasions.

In regard to [REDACTED] promotion, [REDACTED] was promoted from a [REDACTED] to a [REDACTED] (working title [REDACTED]) on August 4, 2012. With the promotion [REDACTED] received a \$21,340 pay increase. The Personnel Action Form, job offer letter, and Position Description Questionnaire (PDQ) related to [REDACTED] promotion are provided as Exhibit Three. Review of the PDQ reveals that at the time of the promotion [REDACTED] did not meet the entry qualifications for the position. Additionally, [REDACTED] is not performing the majority of the duties listed in the PDQ.

[REDACTED] from ADOA Shared Services had assisted Mr. Hernandez with the promotion and pay increase. [REDACTED] confirmed that she reviewed the PDQ with Mr. Hernandez prior to the promotion and that she questioned [REDACTED] qualifications. However, [REDACTED] stated that Mr. Hernandez indicated that [REDACTED] was performing all the duties in the PDQ and met the qualifications of the position.

Also, [REDACTED] was aware of the significant pay increase and ADOA Shared Services entered the transaction into the Human Resources Information System (HRIS). However, at the time of the promotion Boards and Commissions were not required to receive ADOA approval before awarding pay increases to uncovered employees. Copies of the memorandums from ADOA indicating Boards were not required to receive ADOA approval for salary increases at the time of the promotion are included as Exhibit Four.

On April 25, 2013, Mr. Hernandez spoke to [REDACTED], ADOA Shared Services [REDACTED], about reallocating [REDACTED] position to an official [REDACTED], as her current position is a [REDACTED], with the working title of [REDACTED]. Mr. Hernandez and [REDACTED] discussed increasing [REDACTED] pay by 2.5 percent if her position was reallocated to a [REDACTED] position. However, [REDACTED] advised Mr. Hernandez that most requests to hire or promote [REDACTED] in small agencies have not been approved as the belief of the Department of

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Administration is that small agencies do not need [REDACTED]. To date, Mr. Hernandez has not submitted the reallocation request for [REDACTED].

**Allegation Six**

[REDACTED] alleged that Mr. Hernandez calls employees into his office, tells them confidential information, and then asks them to gossip about each other. [REDACTED] stated that Mr. Hernandez attempts to manipulate staff and turn them against each other.

**Finding Allegation Six**

This allegation is substantiated.

Each employee and Board Member confirmed that they have been asked to gossip about each other, spy on each other, and each was told that other employees were talking badly about them behind their backs. They all indicated that they felt they were being manipulated and that Mr. Hernandez was attempting to turn them against each other.

Mr. Hernandez denies ever sharing confidential information about individual employees. Mr. Hernandez stated that staff freely tell him things, but he does not ask and does not share the information with other staff.

All four clerical staff confirmed that Mr. Hernandez has told them he was going to discharge Ms. Aguilar and that he has advised Ms. Aguilar to find another job. [REDACTED] has stated that Mr. Hernandez told her he was going to discharge Ms. Jackson and Ms. Kirkpatrick. All four stated that Mr. Hernandez has told them he was going to discharge Mr. Thomas and Mr. LaSota.

Both [REDACTED] and [REDACTED] stated that Mr. Hernandez informed them that the Governor gave him permission to fire any Board Member he chose and that he was planning on dismissing Mr. Thomas and Mr. LaSota.

[REDACTED] from Victims' Services stated that [REDACTED] told her that Mr. Hernandez wanted information about [REDACTED]. [REDACTED] stated that it was implied that if she reported to [REDACTED] everything [REDACTED] did that the Board would hire [REDACTED] and provide her a substantial pay increase.

**Allegation Seven**

[REDACTED] alleged that Mr. Hernandez and [REDACTED] picked on and harassed her, subjected her to a hostile work environment, disciplined her, forbid her from speaking to co-workers, and subjected her to other actions which she stated were discriminatory.

**Finding Allegation Seven**

This allegation is substantiated.



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According to the four clerical staff, when [REDACTED] was hired, Mr. Hernandez and [REDACTED] spent a lot of time in Mr. Hernandez' office, behind closed doors. Staff have indicated that it was clear that Mr. Hernandez really liked [REDACTED], but he only spoke to [REDACTED] when the [REDACTED], [REDACTED], was out of the office. The majority of the staff indicated that Mr. Hernandez and [REDACTED] appeared to be "flirting" with each other. Mr. Hernandez was observed touching [REDACTED] hair on several occasions by several different employees and Mr. Hernandez and [REDACTED] were reported to stand very close together when they spoke to each other.

The four staff stated that [REDACTED] seemed to resent [REDACTED] and appeared to be jealous of Mr. Hernandez' interest in [REDACTED]. [REDACTED] in turn avoided interacting with [REDACTED] and preferred to interact directly with Mr. Hernandez; which staff report exacerbated the problems between [REDACTED] and [REDACTED].

When [REDACTED] was hired she was assigned to work at the Phase I Commutations desk. [REDACTED] and the four clerical staff have indicated that [REDACTED] was performing satisfactorily at this desk. On January 22, 2013, [REDACTED] was reassigned to the Revocations Desk.

[REDACTED] was responsible for training [REDACTED] on the duties of the Revocations Desk. Three of the four staff interviewed stated that the Revocations Desk is the most difficult of all the clerical assignments and that due to the large number of Revocation hearings the desk should be managed by two staff. The staff stated that this desk was too complex for a new person to handle alone. The three staff who have worked the Revocations Desk all indicated that [REDACTED] was doing a fine job at the Revocations Desk and was not making any more errors than any of them made while in training at the Revocations Desk.

[REDACTED] stated that [REDACTED] was only on the Revocations Desk for at most three months and had not received adequate training on the desk. [REDACTED] had provided only three weeks of training, [REDACTED] had provided a small amount of training, and [REDACTED] had provided a small amount of training to [REDACTED]. All three trainers trained differently, which caused more confusion to [REDACTED].

[REDACTED] and Mr. Hernandez both reported that on April 9, 2013, [REDACTED] met with Mr. Hernandez and [REDACTED] and reported to them that [REDACTED] was making numerous severe mistakes at the Revocations Desk, which was resulting in hearings not being scheduled and inmates not being timely released from the prisons. [REDACTED] and Mr. Hernandez stated that they asked [REDACTED] to document all job functions which she trained [REDACTED] to perform and report to them any errors [REDACTED] discovered which were made by [REDACTED].

According to both [REDACTED] and Mr. Hernandez, on April 15, 2013, [REDACTED] called [REDACTED] and announced that she was resigning her position with the Board effective immediately. They stated that [REDACTED] provided explanation that she was resigning her position because working with [REDACTED] was intolerable. Both stated that [REDACTED] reported that [REDACTED] continuously gossiped and complained about [REDACTED] and Mr. Hernandez and that [REDACTED] planned to file a sexual harassment claim against Mr. Hernandez.

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According to Mr. Hernandez and [REDACTED], [REDACTED] stated she could not work with [REDACTED] due to [REDACTED] inappropriateness and the severity of the errors [REDACTED] was making on the Revocations Desk. Both stated that they advised [REDACTED] that if she did not resign that they would remove [REDACTED] from the Revocations Desk and not allow [REDACTED] to speak to [REDACTED].

Both Mr. Hernandez and [REDACTED] stated that in response to [REDACTED] desire to leave the agency because of the actions of [REDACTED], they notified all staff that they were not allowed to gossip or discuss personal issues with each other or any Board Members. Staff were also advised that they were not permitted to speak to the Board Members. In addition, offices were moved so that [REDACTED] was separated from the other staff and lunch and break schedules were staggered. All staff interviewed stated that they were told they were not allowed to speak to each other, Board Members, or ADC employees; this included personal and work related conversations and included before and after work and during breaks and lunches.

When [REDACTED] was interviewed by the investigators she stated that on April 9, 2013, she was called into a meeting with Mr. Hernandez and [REDACTED] where she was instructed to document every job duty she had trained [REDACTED], review all work completed by [REDACTED], and document anything [REDACTED] had not completed correctly. [REDACTED] was provided the same directive to report any training provided to [REDACTED] and document any errors made by [REDACTED].

[REDACTED] was puzzled by the request and indicated she had no issues with [REDACTED] work and had not brought any concerns about [REDACTED] to management's attention. [REDACTED] stated she was advised that any errors made by [REDACTED] were a direct reflection on her because she trained [REDACTED]. [REDACTED] stated that management's request felt like a "witch hunt" in which management was requesting for her to "find every single tiny thing she could find that they could use to get [REDACTED] in trouble".

[REDACTED] stated that on April 15, 2013, she called and notified [REDACTED] that she was resigning her position effective immediately. [REDACTED] told the investigators that the reason she resigned had nothing to do with [REDACTED]; rather, she resigned because she was being forced to help management find reasons to fire [REDACTED].

[REDACTED] confirmed that she stated she would rescind her resignation if management allowed her to discontinue training [REDACTED] and documenting [REDACTED] performance. [REDACTED] said she also stipulated that Mr. Hernandez needed to stop calling staff into his office and expecting them to report on their co-workers' actions and conversations. [REDACTED] also told Mr. Hernandez that he needed to stop calling staff into his office, closing the door, and flirting with them or at some point an employee would file a sexual harassment claim against him. [REDACTED] stated that her comment was not intended to warn him that [REDACTED] was setting him up, but rather to warn him that his own actions would cause a sexual harassment claim.

Subsequently, on April 17, 2013, [REDACTED] was reassigned to the Revocations Desk and [REDACTED] was removed from the Revocations Desk and reassigned to the Reception Desk. [REDACTED] was provided with a memorandum stating her work would be reviewed on May 1, 2013, to determine if

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the Receptionist desk would become her permanent assignment. The memorandum is attached at Exhibit Two.

All four clerical staff stated that in mid-April 2013 it became obvious that management was displeased with [REDACTED] and they were trying to "get rid of her". They stated that management nit-picked [REDACTED] every action and that they were all required to "spy" on [REDACTED] and let management know who [REDACTED] spoke with and when she arrived to work, took lunch and breaks, went to the restroom, and left for the day. Each stated that [REDACTED] was not treated fairly and it was clear management was out to get [REDACTED].

#### **Allegation Eight**

[REDACTED] stated that both Mr. Hernandez and [REDACTED] regularly make inappropriate and discriminatory comments.

#### **Finding Allegation Eight**

This allegation is substantiated.

Following are the allegations made by [REDACTED] that were confirmed by interviewees.

1. Two employees and a Board Member have confirmed that Mr. Hernandez told them [REDACTED] is promiscuous. [REDACTED] stated that Mr. Hernandez told her that when [REDACTED] went to lunch with an ADC employee, [REDACTED], "it was so much more than lunch". [REDACTED] stated that Mr. Hernandez "sounded jealous" when he made the statement. Mr. Hernandez denies making any statement about [REDACTED] being promiscuous.
2. [REDACTED] is [REDACTED] who recently graduated from college and was beginning to seek professional employment. [REDACTED] is also [REDACTED], [REDACTED], and not married. On April 26, 2013, when [REDACTED] informed [REDACTED] and Mr. Hernandez that she was [REDACTED], Mr. Hernandez told her that she was not permitted to tell any Board employee that she was [REDACTED], stated that no employer would hire her since she was [REDACTED], and told her that when she told her mother that she was [REDACTED], her mother would beat her with a bamboo stick.
3. [REDACTED] stated that she was telling Mr. Hernandez and [REDACTED] about her fiancée's cousin and his girlfriend. The girlfriend is from India and her family is considerably wealthy. [REDACTED] said to [REDACTED], "then why is she dating that white trash?" Both Mr. Hernandez and [REDACTED] also made references to [REDACTED] fiancée's family being hillbillies because they are from Arkansas.
4. [REDACTED] stated that Mr. Hernandez routinely calls her a "heathen" because she does not attend church. [REDACTED] indicated that Mr. Hernandez has called her a heathen in the presence of other staff; however, she did not recall which staff may have witnessed the comments. Neither [REDACTED] nor Mr. Hernandez were asked this question as the allegation was made after [REDACTED] and Mr. Hernandez were interviewed.

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5. [REDACTED] stated Mr. Hernandez said her mother was promiscuous because after [REDACTED] parents had been divorced, her mother "got back together" with her father when her father was dying. [REDACTED] stated [REDACTED] witnessed the comment. [REDACTED] denied hearing this comment.
6. Two Board Members, [REDACTED] and [REDACTED], both stated that Mr. Hernandez told them [REDACTED] is too old to be effective on the Board and that his mind is not what it used to be.
7. [REDACTED] and [REDACTED] also stated that Mr. Hernandez told them [REDACTED] needs to stop "shucking and jiving with the brothers". Both Board Members stated that Mr. Hernandez was referring to [REDACTED] speaking to other [REDACTED] men and high level ADC Deputy Directors and Wardens.
8. Everyone interviewed discussed Mr. Hernandez' substantial ego and stated, "Mr. Hernandez' head is so big he can hardly get into the building". Most of the interviewees indicated Mr. Hernandez' ego is especially prevalent in his interactions with women. [REDACTED] referred to Mr. Hernandez as, "thinks he is the king and you are the maidservant and you better act that way". Several staff provided examples of Mr. Hernandez being disrespectful and yelling at women visitors and advocates during the hearings.  
  
[REDACTED] stated that she has personally heard Mr. Hernandez make inappropriate comments about women and stated she told him his comments were inappropriate. [REDACTED] could not recall the specific comments.
9. Three staff confirmed that Mr. Hernandez had them hold hands and then led them in a prayer at the Board Christmas party. All confirmed that Mr. Hernandez did not provide them an option of not participating. Several staff were offended. None felt they had the option of declining participation.
10. [REDACTED] from Victims Services stated she has heard Mr. Hernandez refer to inmates as "fucking scumbags".

#### **Allegation Nine**

[REDACTED] alleged that Mr. Hernandez and [REDACTED] were not holding hearings in accordance with relevant statutes and policies and that Mr. Hernandez was treating Board Members and visitors inappropriately.

#### **Finding Allegation Nine**

This allegation is substantiated.

Each staff and Board Member and the ADC Victim's Services group were interviewed and mentioned concerns with the manner in which Mr. Hernandez conducts hearings.



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██████████, ██████████ and ██████████, as well as ██████████ from Victims Services stated that the Board was violating Arizona Revised Statute § 13- 4414 (Exhibit Five) by failing to provide victims with 15 days' notice when hearings were being held or cancelled or inmates released. The issue was brought to Mr. Hernandez' attention but he continues to schedule hearings with less than 15 days as required by statute. Additionally, when hearings were cancelled the Board has failed to notify the victims. When the victims have complained Mr. Hernandez has told the victims that Victims' Services was at fault for failing to notify them.

The practice for Board hearings is that a schedule is created 15 days in advance of the hearing and lists all the hearings that will be held each day. On average three to eight hearings are scheduled each day Monday through Thursday. All interested parties are notified of the date of the applicable hearing (i.e. inmates, families of inmates and victims, attorneys for the inmates or victims, and advocates for the inmates and victims). No specific times are scheduled for the hearings. Rather, any visitors, lawyers, etc. must report to the lobby at the start of the day, generally either at 8:00 a.m. or 9:00 a.m. The visitors wait in the lobby until the applicable hearing is held, then they are called into the Board room. Hearings can last anywhere from 30 minutes to three hours. Visitors can wait in the lobby anywhere from a few minutes to the entire day. The practice has always been and continues to be when Mr. Hernandez is not present, that hearings are held by prison unit and within the unit the hearings with visitors are heard first.

Three staff members, two Board Members, and two Victims' Services interviewees stated that Mr. Hernandez deliberately holds hearings in which family members are present late in the day. Family members are not informed what time their hearing is scheduled, so they wait in the lobby all day until they are called. They generally do not leave to eat lunch because the hearing might be held while they are gone.

For numerous years there have been vending machines in the lobby of the building so that families and visitors could have water and snacks in case there was a lengthy delay before their hearing. Mr. Hernandez has recently removed the vending machines and stated he did not want people eating in his lobby.

██████████ reported that she witnessed Mr. Hernandez hold hearings straight through all day without restroom or lunch breaks. ██████████ stated that ██████████ was vocal to Mr. Hernandez about being a ██████████ and needing to eat and take his ██████████ on regular intervals, yet Mr. Hernandez "gave ██████████ grief" and did not alter his hearing schedule to accommodate ██████████ or anyone else to eat or take breaks. ██████████ confirmed Mr. Hernandez' actions related to the hearings. ██████████ stated that his health began deteriorating so he eventually insisted on taking breaks, to which Mr. Hernandez is now supportive.

Additionally, all four clerical employees, all four Board Members, and all three Victims' Services employees stated that Mr. Hernandez is rude and condescending to the Board Members, inmates and visitors and often talks down to them, yells at them, or does not allow them to speak. This is problematic for the Board Members who are attempting to obtain relevant information in order to make determinations on inmate releases.

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In one recent instance related to the hearing of an inmate convicted of child molestation, Mr. Hernandez said on tape, "Would you like a child molester living in your neighborhood? No, okay then." During another hearing the family was requesting early release for the inmate because the inmate was dying. Mr. Hernandez stated he did not think the family was prepared. They did not know what he was referring to as no preparation was required. Mr. Hernandez stated he "would just let the inmate die" rather than consider the hearing request for release.

In another recent incident a female advocate was expressing her opinion when Mr. Hernandez stood up, yelled at her to shut up and sit down, and demanded that she not disrespect him.

Several employees and Board Members have stated that Marwin Williams, the brother of Amare Stoudemire of the New York Knicks, was scheduled for an early release hearing about nine months ago. All notices were sent to interested parties and the parents of a victim who was murdered in the robbery leading to Mr. William's imprisonment drove over 250 miles to attend the hearing. Mr. William's attorney requested a continuation because they were not ready to present their case. Mr. Hernandez provided the continuation.

Several employees and Board Members have stated that Mr. Hernandez provided his personal cell phone number to Mr. Stoudemire at the hearing and the two of them have since been in communication. Mr. Hernandez has spoken freely to staff about his relationship with Mr. Stoudemire and joked that Mr. Stoudemire has provided him tickets to basketball games and the two have met for lunch along with Mr. Hernandez' children. Mr. Hernandez also requested for a staff Member to take a photograph of Mr. Hernandez and Mr. Stoudemire. The photograph was posted on Mr. Stoudemire's website. The photograph is attached as Exhibit Six.

Mr. Williams' hearing was rescheduled for June 13, 2013. The victim's mother drove the 250 miles again to attend the hearing. The mother has [REDACTED] and has very limited financial resources. On the day of the hearing Mr. Williams' new attorney spoke to Mr. Hernandez privately in Mr. Hernandez' office and stated that the family had fired the previous attorney that morning and therefore would be requesting a fourth continuation because they were not prepared for the hearing.

When the hearing began, Mr. Hernandez sat as the chair of the hearing. Mr. Williams' attorney requested the continuation. Mr. Hernandez granted the continuation without allowing any Board Members or the victim's family to provide input. Board Members and employees have stated that it was inappropriate for Mr. Hernandez to meet with or have any communication with the inmate's family outside of the hearings. The Board Members and employees have also stated that it goes against the principles of the Board meetings for the chair to make a decision without having a discussion or allowing anyone to speak. A computer disk with the recording of the hearing is available with this report.

#### **Additional Allegations:**

The following allegations were not brought up by [REDACTED], but were brought forward by interviewees during the course of the investigation.

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**Allegation Ten**

Ms. Kirschbaum stated that Board Members are not permitted to review their recommendations before they are submitted to the Governor's Office. Rather, Ms. Aguilar edits their letters then stamps their names on them. The Board Members have requested to review the letters before they are sent and have requested to manually sign the letters. The Board Members have also requested to receive copies of the finalized recommendation letters. They have yet to see the letters before they are sent to the Governor or receive copies of the final letters.

**Finding Allegation Ten**

This allegation is substantiated.

All four Board Members have confirmed that they have requested to review the letters, sign them manually and receive copies of the final letters. However, they have yet to receive responses to their request.

Additionally, Mr. Thomas was vocal about requesting to see the recommendation letters. Ms. Kirschbaum stated that in response to Mr. Thomas' vocalization of his concerns, Mr. Hernandez told Ms. Kirschbaum that the Governor advised Mr. Hernandez that he can fire Mr. Thomas.

**Allegation Eleven**

It was also alleged that Mr. Hernandez watches females' rear ends as they walk by, including [REDACTED], [REDACTED], [REDACTED] and visitors to the building.

**Findings Allegation Eleven**

This allegation is substantiated.

Three of the employees interviewed stated that they have personally witnessed Mr. Hernandez stare at the buttocks of two employees, [REDACTED] and [REDACTED], and watch them walk by until they are out of sight. One of the employees also stated that on one occasion when Mr. Hernandez was watching a woman walk by outside the window, Mr. Hernandez, stated, "Sorry, I'm a guy, I have to look".

**CONCLUSION:**

Three of the twelve allegations were found to be inconclusive. There were no witnesses to the alleged events and no documentation was provided to substantiate the claim of sexual harassment.

The other nine allegations of inappropriate actions by Mr. Hernandez related to his interactions with staff and Board Members and his handling of hearings were substantiated.

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**Prepared by:**

[REDACTED]

Human Resources Officer, Shared Services Unit  
Arizona Department of Administration



Janice K. Brewer  
Governor



David Raber  
Interim Director

**ARIZONA DEPARTMENT OF ADMINISTRATION**

**OFFICE OF THE DIRECTOR**

100 NORTH FIFTEENTH AVENUE • ROOM 401  
PHOENIX, ARIZONA 85007

(602) 542-1600

**MEMORANDUM**

**TO:** All Cabinet Level Agency Directors, Boards and Commissions  
**FROM:** David Raber, Interim Director *DM*  
**DATE:** March 30, 2010  
**SUBJECT:** Salary Increases of Uncovered Employees

---

Effective immediately, all requests for salary increases of uncovered employees must be approved by my office prior to any implementation.

The purpose of this policy is to ensure that the pay reductions pursuant to HB2003 are not offset by other personnel actions. This policy will remain in effect until June 30, 2012, unless modified or extended as necessary.

Thank you for your cooperation.

c: Kathy Peckardt, Human Resources Director

Janice K. Brewer  
Governor




Scott A. Smith  
Director

**ARIZONA DEPARTMENT OF ADMINISTRATION**

**OFFICE OF THE DIRECTOR**

100 NORTH FIFTEENTH AVENUE • SUITE 401  
PHOENIX, ARIZONA 85007  
(602) 542-1500

**MEMORANDUM**

**TO:** All Cabinet Level Agency Directors, Boards and Commissions  
**FROM:** Scott A. Smith, Director   
**DATE:** June 21, 2012  
**SUBJECT:** Salary Increases of Uncovered Employees

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In March 2010, a new policy was implemented that required all salary increases for uncovered employees be approved by ADOA prior to processing. The directive was to remain in effect until June 30, 2012.

Given the continued concern of the budget situation and the sluggish economic conditions, the policy is being extended for all cabinet level agencies until January 2015.

I encourage all other agencies, boards and commissions to continue to scrutinize such actions and to ensure sufficient justification supports any uncovered salary increase.

As we move forward with the implementation of personnel reform, the Human Resources Division will provide future guidance on compensation.

If you should have any questions regarding this policy, please contact ADOA Human Resources at 602.542.5482. Thank you for your cooperation.

cc: Kathy Peckardt, Human Resources Director

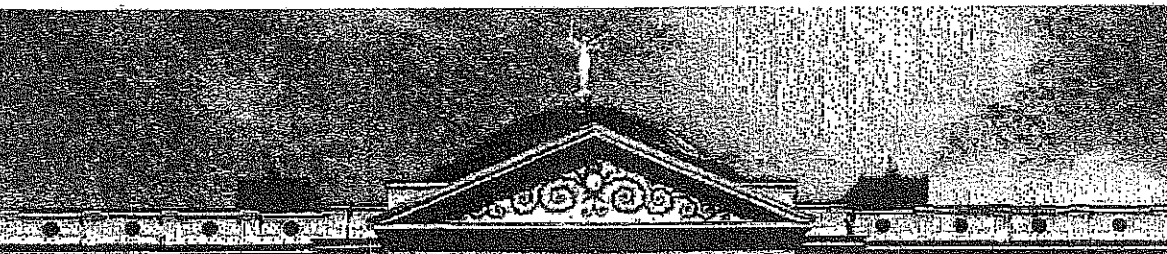
**13-4414. Notice of post-conviction release; right to be heard; hearing; final decision**

A. The victim has the right to be present and be heard at any proceeding in which post-conviction release from confinement is being considered pursuant to section 31-233, section 31-326 or section 31-411.

B. If the victim has made a request for post-conviction notice, the board of pardons and paroles shall, at least fifteen days before the hearing, give to the victim written notice of the hearing and of the victim's right to be present and be heard at the hearing.

C. If the victim has made a request for post-conviction notice, the board of pardons and paroles shall give to the victim notice of the decision reached by the board. The notice shall be mailed within fifteen days after the board reaches its decision.

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**31-233. Order for removal; purposes; duration; continuous alcohol monitoring program; failure to return; classification**

A. The director may authorize the temporary removal under custody from prison or any other institution for the detention of adults under the jurisdiction of the department of any inmate for the purpose of employing the inmate in any work directly connected with the administration, management or maintenance of the prison or institution in which the inmate is confined, for purposes of cooperating voluntarily in medical research that cannot be performed at the prison or institution, or for participating in community action activities directed toward delinquency prevention and community betterment programs. The removal shall not be for a period longer than one day.

B. Under specific rules established by the director for the selection of inmates, the director may also authorize furlough, temporary removal or temporary release of any inmate for compassionate leave, for the purpose of furnishing to the inmate medical treatment not available at the prison or institution, for purposes preparatory to a return to the community within ninety days of the inmate's release date or for disaster aid, including local mutual aid and state emergencies. When an inmate is temporarily removed or temporarily released for a purpose preparatory to return to the community or for compassionate leave, the director may require the inmate to reimburse the state, in whole or part, for expenses incurred by the state in connection with the inmate's temporary removal or release.

C. Under specific rules established by the director for the selection of inmates, the director also may authorize release under a continuous alcohol monitoring program for any inmate who is sentenced pursuant to section 28-1383, subsection D or E and who is placed on probation. The director may require an inmate who is released under a continuous alcohol monitoring program to reimburse the state, in whole or part, for expenses incurred by the state in connection with the inmate's release.

D. An inmate who is released under a continuous alcohol monitoring program shall meet the following program eligibility requirements:

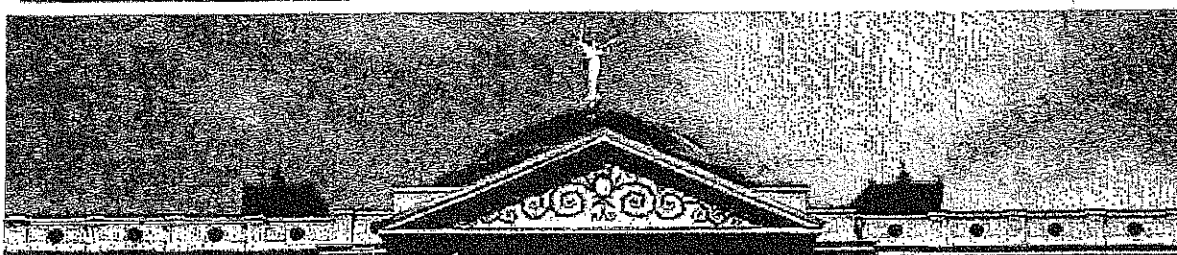
1. Serve an initial minimum term of twenty per cent of the inmate's term of incarceration.
2. Maintain compliance during the period of monitoring with all of the following requirements:
  - (a) At a minimum, once a day testing for the use of alcoholic beverages or drugs by a scientific method that is chosen by the director.
  - (b) Participation in an alcohol or drug program, or both. These programs shall be accredited by the department of health services.
  - (c) Prohibition of association with any person who is determined to be detrimental to the inmate's successful participation in the program.
  - (d) All other provisions of the inmate's sentence.
3. Any additional eligibility criteria that the director may impose.

E. Except if community supervision is waived pursuant to section 13-603, subsection K, the department shall add the amount of time the director approves for the inmate's temporary release to the inmate's term of community supervision imposed by the court pursuant to section 13-603. While the person is on temporary release the person is not on inmate status and is under the jurisdiction of the department until the terms of community supervision are met.

F. Any inmate who knowingly fails to return from furlough, temporary removal or temporary release granted under this section is guilty of a class 5 felony.



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**31-411. Parole or discharge; conditions of parole; release under supervision of state department of corrections; notice of hearing; exceptions; drug testing costs**

A. Any prisoner who has been certified as eligible for parole or absolute discharge from imprisonment pursuant to section 31-412, subsection B or section 41-1604.09 shall be given an opportunity to apply for release on parole or for an absolute discharge from imprisonment. The board of executive clemency shall not entertain any other form of application or petition for the release on parole or absolute discharge from imprisonment of any prisoner.

B. A prisoner who is eligible for parole or absolute discharge from imprisonment shall be given an opportunity to be heard either before a hearing officer designated by the board or the board itself, at the discretion of the board.

C. If the hearing is heard by a hearing officer, the hearing officer shall make a recommendation on application for parole or absolute discharge from imprisonment to the board within thirty days after the hearing date. Within thirty days after the date of the hearing officer's recommendations, the board shall review these recommendations and either approve, with or without conditions, or reject the prisoner's application for parole or absolute discharge from imprisonment. A prisoner who is eligible for parole or absolute discharge from imprisonment shall not be denied parole or absolute discharge from imprisonment without an opportunity to be heard before the board unless another form of release has been granted.

D. If parole is granted, the prisoner shall remain on parole unless the board revokes the parole or grants an absolute discharge from parole or until the prisoner reaches the individual earned release credit date pursuant to section 41-1604.10. If the prisoner violates a condition of parole but has not committed an additional offense, the board may place the prisoner on electronic monitoring and order the defendant to participate in a community accountability pilot program pursuant to section 41-1609.05. If the prisoner is still on parole on reaching the individual earned release credit date pursuant to section 41-1604.10, the prisoner shall be terminated from parole but shall be subject to revocation under section 41-1604.10. When the prisoner reaches the individual earned release credit date the prisoner's parole shall be terminated and the prisoner shall no longer be under the authority of the board.

E. During the period of time that the prisoner remains on supervised parole under subsection D of this section, the board shall require as a condition of parole that the prisoner pay a monthly supervision fee of not less than sixty-five dollars unless, after determining the inability of the prisoner to pay the fee, the board requires payment of a lesser amount. The supervising parole officer shall monitor the collection of the fee. The board may also impose any conditions of parole it deems appropriate in order to ensure that the best interests of the prisoner and the citizens of this state are served. These conditions may include:

1. Participation in a rehabilitation program or counseling.
2. Performance of community restitution work.

F. Seventy per cent of the monies collected pursuant to subsection E of this section shall be deposited, pursuant to sections 35-146 and 35-147, in the victim compensation and assistance fund established by section 41-2407 and thirty per cent shall be deposited in the community corrections enhancement fund established by section 31-418.

G. When parole or absolute discharge from imprisonment is denied, the board, within ten days, shall prepare and deliver to the director of the state department of corrections a written statement specifying the individualized reasons for the denial of parole or absolute discharge from imprisonment unless another form of release has been granted. The prisoner may view the written statement prepared by the board. Every prisoner, having served not less than one year, may be temporarily released according to the rules of the department one hundred eighty days before the expiration of the sentence or the earned release credit date, whichever first occurs, if the director finds that the release is in the best interest of the state. The releasee

shall remain under the control of the state department of corrections until expiration of the term specified in the sentence. If the releasee violates any condition of release, the releasee may be returned to custody without further process.

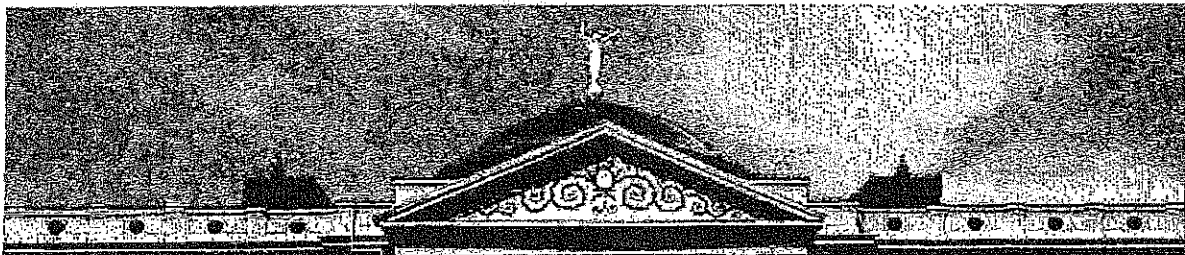
H. When a commutation, absolute discharge from imprisonment or parole is to be considered, the board, on request and before holding a hearing on the commutation, absolute discharge from imprisonment or parole, shall notify the attorney general, the presiding judge of the superior court, the county attorney in the county in which the prisoner requesting a commutation, absolute discharge from imprisonment or parole was sentenced, and the victim of the offense for which the prisoner is incarcerated. The notice to the victim shall be mailed to the last known address. The notice shall state the name of the prisoner requesting the commutation, absolute discharge from imprisonment or parole and shall set the month of hearing on the application. The notice to the victim shall also inform the victim of the victim's right to be present and to submit a written report to the board expressing the victim's opinion concerning the release of the prisoner. No hearing concerning commutations, absolute discharge from imprisonment or parole shall be held until fifteen days after the date of giving the notice. On mailing the notice, the board shall file a hard copy of the notice as evidence that notification was sent.

I. The provisions of this section requiring notice to the officials named in subsection H of this section shall not apply:

1. When there is imminent danger of the death of the person convicted or imprisoned.
2. When the term of imprisonment of the applicant is within two hundred ten days of expiration.

J. In addition to any other fees, the board may require as a condition of parole that the prisoner pay the reasonable costs associated with the prisoner's participation in a drug testing program. The prisoner's costs shall not exceed the department's cost for the program. The monies collected pursuant to this subsection by the department may only be used to offset the costs of the drug testing program.

Bill Number Search:



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**31-403. Commutation; restrictions on consideration**

A. A person who is otherwise eligible for commutation and who is denied a commutation of sentence recommendation shall not petition or be considered by the board for commutation of that sentence for a period of five years following the date of the board's denial of the commutation recommendation if the offense for which the commutation recommendation was denied involved any of the following:

1. Death in violation of section 13-1104 or 13-1105.
2. Serious physical injury if the person was sentenced pursuant to section 13-704.
3. A dangerous crime against children as defined in section 13-705.
4. A felony offense in violation of title 13, chapter 14 or 35.1.

B. Notwithstanding subsection A, paragraph 2 of this section, if, in its sole discretion, the board determines that the person committed an offense that involved serious physical injury as defined in section 13-105 and that the person was not sentenced pursuant to section 13-704, the board may order that the person shall not petition or be considered by the board for commutation of that sentence for a period of five years following the date of the board's denial of the commutation recommendation.

C. Notwithstanding subsection A or B of this section, the board, at the time of denial, may lengthen the five year period of time prescribed in subsection A or B of this section to a period of up to ten years, except that if the offense for which commutation was denied involved a violation of an offense listed in subsection A, paragraph 1 of this section, the board may lengthen the period of time to a period of time that is greater than ten years and that is specified by the board by one of the following votes:

1. A majority affirmative vote if four or more members consider the action.
2. A unanimous affirmative vote if three members consider the action.
3. A unanimous affirmative vote if two members consider the action pursuant to section 31-401, subsection I and the chairman concurs after reviewing the information considered by the two members. If the chairman is one of the two members constituting a two member quorum under section 31-401, subsection I, and both the chairman and the other member vote to lengthen the five year period to a period of time greater than ten years, no further action shall be taken and the decision on whether to lengthen the five year period shall be considered by the board at a meeting at which at least three members are present and voting.

D. The board may waive the provisions of subsections A, B and C of this section if any of the following applies:

1. The person is in imminent danger of death due to a medical condition, as determined by the board.
2. The person is the subject of a warrant of execution.
3. The sentence for which commutation is sought is the subject of a special order issued by the court pursuant to section 13-603, subsection L.

E. This section applies only to offenses that are committed on or after January 1, 2006.

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**ARIZONA BOARD OF EXECUTIVE CLEMENCY  
BOARD POLICY**

<b>Policy Title</b> Commutation of Sentence	<b>Effective Date</b> 10/19/2011	<b>Policy No</b> 400.13.G
	<b>Supersedes</b> 400.13.F 08/10/2009	<b>Page(s)</b> 1 of 3

**Authority**

ARS § 13-603(L)  
ARS § 31-402  
ARS § 31-411 (H)(I)(1)  
ARS § 38-431.01  
ARS § 31-403

**Policy**

It is the policy of the Arizona Board of Executive Clemency, to conduct a hearing for all eligible applicants to determine whether to recommend to the Governor that a commutation of sentence be granted. If granted, the action changes the penalty imposed by a court on a convicted felon to one that is less severe, but does not restore the inmate's civil rights.

**Procedures**

- A. Individuals must complete and sign the application for commutation form adopted by the Board.
- B. All applications made to the Governor for a commutation of sentence are transmitted to the Chairperson of the Board of Executive Clemency for review. Only those applicants deemed eligible after review by the Department of Corrections, will be scheduled for a hearing.
- C. Only those applicants who have served two (2) years from their sentence-begin date and are not within one (1) year of their release eligibility date as determined by the Department of Corrections will be considered. However, in cases where an applicant has served only one (1) year of his or her sentence, but is not in imminent danger of death or in a persistent



vegetative state, the Board may consider and act on an application for commutation of sentence if all of the following apply:

- i. the applicant's sentence is three (3) years or less;
- ii. the applicant is not within six (6) months of their earliest eligibility release date

D. An order of the court pursuant to ARS § 13-603 (L) – i.e., that the court at the time of sentencing finds that the legally mandated sentence is clearly excessive – allows the defendant, notwithstanding the minimum service requirements of subsection C. of this policy, to petition the Board, within ninety days after commitment to the Department of Corrections, for commutation of that sentence, even if the sentence is a consecutive sentence that the defendant has not yet begun to serve (i.e., a future consecutive sentence). If on the initial petition commutation is not recommended or is denied by the Governor, after the two-year waiting period imposed in subsection I. and so long as there is no law to the contrary, the Board may again consider an application for commutation of any or all current sentences or future consecutive sentences for which there is a ARS § 13-603 (L) order, even though the defendant has not yet begun to serve the sentence(s).

E. When the applicant is in imminent danger of death or in a persistent vegetative state, and the medical status has been verified by the Department of Corrections, or the Board has received a warrant of execution issued by the Arizona Supreme Court, or in cases where the court has entered a special order pursuant to ARS § 13-603 (L), or the applicant has been recommended to the Governor for a commutation previously for the same sentence, the Board may waive the above eligibility criteria and schedule a Phase II hearing. In order for the Board to consider the application, however, the applicant must meet the statutory eligibility criteria.


F. Except as provided in subsection E. and in subsection F.3 of this policy, commutation hearings will be held in two phases:

- i. On the date set by the Chairperson for the Phase I hearing, the Board will review the application, applicant's files, letters and all relevant information. The Phase I hearing is an in absentia hearing; however, family, friends, victims, other witnesses and legal counsel may submit written information concerning the matter or may provide oral testimony. At the conclusion of the hearing, the Board may take one of the following actions:
  - a. Find by a majority vote of the Board members that there is no basis for further consideration on the application.

- b. Find by a majority vote of the Board members that sufficient reasons exist to warrant further investigation, and pass the matter to a Phase II hearing.
  - ii. At the Phase II hearing, the Board will interview the applicant, review all relevant information and take testimony from family, friends, victims, other witnesses and/or legal counsel. At the conclusion of the hearing, a final decision is made to either recommend this action to the Governor or not to recommend this action to the Governor.
  - iii. If an Inmate is the subject of a warrant of execution issued by the Arizona Supreme Court the requirement for a Phase I hearing does not apply.
- G. When a majority of the Board votes to recommend a commutation of sentence to the Governor, a letter of recommendation is prepared that includes the reasons for the affirmative vote. Letters of dissent may also be prepared and forwarded.
- H. Letters of recommendation and if applicable, dissent letters, along with the case materials considered by the Board at the Phase II hearing, are transmitted to the Governor by the Chairman.
- I. Subsequent applications for commutation of sentence for an offense committed before January 1, 2006, are not considered until a period of two (2) years has elapsed from the final action taken by the Board on the matter.
- J. Subsequent applications for commutation of sentence for an offense committed on or after January 1, 2006, that are not governed by ARS § 31-403, are not considered until a period of two (2) years has elapsed from the final action taken by the Board on the matter.

#### **Implementation**

This policy was adopted by the Arizona Board of Executive Clemency in accordance with law.



Duane Belcher, Sr.

Chairman

10/19/2011

Date

ARIZONA CONSTITUTIONAL RIGHTS FOR CRIME VICTIMS  
(After conviction and sentencing)

A victim of crime has a right:

1. To be treated with fairness, respect and dignity, and to be free from intimidation, harassment or abuse, throughout the criminal justice process.
2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
3. To read presentence reports relating to the crime against the victim when they are available to the defendant.
4. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.
5. To be heard at any proceeding when any post conviction release from confinement is being considered.
6. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.
7. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.
8. To be informed of victims' constitutional rights.

In addition to those Constitutional rights listed above, victims of crime have the following rights under Arizona law.

1. The right to be notified, upon request, prior to any hearing of reconsideration of release on parole, work furlough, home arrest, or commutation.
2. The right to be present and to submit a written report to the Board expressing an opinion concerning the release of the prisoner.
3. The right to be notified, upon request, of the results of any Board release hearing.

IN ORDER TO IMPLEMENT YOUR RIGHTS, PLEASE FILL OUT THE FORM ON THE BACK OF THIS PAGE AND RETURN IT TO THE ADDRESS INDICATED.

Victims' addresses are considered confidential by the Board and are not released.

NOTE: No additional notices will be sent to you unless we receive a completed request form.

Amare Stoudemire (amarestoudemire): Government office working.

Page 1 of 2

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September 23, 2013  
ADDENDUM TO  
Complaint Investigation  
Arizona Board of Executive Clemency, August 6, 2013

After listening to the June 13, 2013 hearing of Marwan Williams Phase I Commutation Hearing it was determined that the information supplied by those interviewed is inconsistent. This ADDENDUM is based on what is factually supportable in the record after further review of foundation for Findings in the report.

The following information was obtained from listening to the recording of the June 13 hearing:

- Page 13, paragraph three, is clarified that it was Mr. Stoudemire who requested the continuation on behalf of Marwan Williams during the hearing of June 13, 2013, not Mr. Williams' attorney.
- Page 13, paragraph five, is clarified that Kristin Sherman of the Maricopa County Attorney's Office stated the victim's family drove 150 miles to the hearing, not 250 miles as reported by two individuals during the investigation.
- Page 13, paragraph five, is clarified that it has not been substantiated that an attorney representing Mr. Williams spoke to Mr. Hernandez privately in Mr. Hernandez' office.

Related clarifying information from Board of Executive Clemency records not previously included:

- During the June 13, 2013 hearing, Jack LaSota, Board Member, asked if Tracey Westerhausen was Mr. Williams' current counsel. Mr. Stoudemire stated no, though she was previously, Mr. Williams was seeking a new attorney.
- During the June 13, 2013 hearing, Colleen Crase stated that Ms. Westerhausen was at the Board of Executive Clemency Office before the hearing that day and that Ms. Crase spoke to Ms. Westerhausen.
- During the June 13, 2013 hearing, Jesse Hernandez stated that he also saw Ms. Westerhausen.
- Visitor sign-in sheet with Ms. Westerhausen's name indicating she was present at the Board of Executive Clemency Office on June 13, 2013.

# Exhibit B

**AFFIDAVIT**

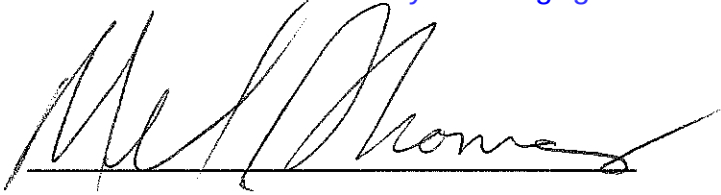
STATE OF ARIZONA     )

) ss.

County of Maricopa     )

MELVIN THOMAS, having first been duly sworn, depose and state as follows:

1. I served as a member of the Arizona Board of Executive Clemency from April 9, 2012 until I retired on August 5, 2013.
2. During the time I served as a Board member, I would vote based on the materials presented, the verbal testimony and the evidence offered at a hearing.
3. I was never pressured by anyone at the Governor's Office on how to vote in a particular matter. My decisions were never influenced by how they would be perceived by the Governor. I never believed that my job was in jeopardy based on how I voted. I voted based solely on my beliefs and not by any other influences.
4. I did not discuss Mr. Schad's case with Ellen Kirschbaum and Brian Livingston in a break room or anywhere else outside of a public meeting. I have never stated that I would vote 'no' regarding Mr. Schad's case or any other inmates' case outside of a properly noticed Board meeting. I have never engaged in conversations or actions that have violated Arizona's opening meetings laws.
5. Ms. Kirschbaum or Mr. Livingston never told me that they would vote no to recommend clemency for Mr. Schad.
6. Chairman Hernandez stated to the Board members that the Governor had been unhappy with one of our decisions. I did not ever hear from the Governor or her staff that she was unhappy with any of the Board's decisions.



SUBSCRIBED AND SWORN to before me this 30th day of September, 2013.



Notary Public

My Commission expires:

Nov 18, 2014





# Exhibit C

**AFFIDAVIT**

STATE OF ARIZONA        )

                              ) ss.

County of Maricopa        )

ELLEN KIRSCHBAUM, having first been duly sworn, depose and state as follows:

1. I serve on the Arizona Board of Executive Clemency. I was appointed to the Board December, 2010 and confirmed in April, 2011. My term expires January, 2015. I was interviewed by the Executive Clemency Selection Committee and believe I was selected to serve on the Board based on my qualifications and experience. During this interview and/or after selection, I was never contacted or engaged in conversation regarding the Governor's position on clemency or how I should vote as a member of the Board.
2. I have never met the Governor professionally or socially. I do not know her position on clemency.
3. I have no knowledge of any letter from the Governor's office informing a board member that the Governor was displeased with a Board member's vote.
4. I recognize my appointment is for a five year term and I am aware that the Governor may dismiss me for cause. I have never been told that my voting record may be considered cause for dismissal during my term.
5. My decisions are independent from ~~my~~ outside influence and are not based on what my perception of what would please the Governor.
6. I have voted "yes" in many clemency cases where I believed the sentence was excessive and/or the individual was deserving of mercy. I was one of the "yes" votes in the high profile case of Mr. Robert Flibotte and authored the letter that was signed by all the members of the Board recommending clemency to the Governor.
7. I have voted for clemency in various cases including the 'high profile' case of Betty Smithey. I also voted for clemency in the Erik Oman case. In that case the Board voted unanimously to grant clemency and the Governor granted the clemency. I authored both recommendations in those cases (Mr. Erik Oman and another gentleman).
8. I have not stated to fellow board members or heard other board members state their final decision on a particular case prior to a hearing outside a public meeting.

9. I have never been informed and/or reprimanded by Mr. Hernandez regarding his awareness that I or any other Board member had stated we would not vote for Mr. Schad's clemency.
10. I have not made a final decision regarding Mr. Schad's clemency hearing. Prior to Mr. Schad's March, 2013 hearing, I had reviewed the materials. Since that time, I do not recall the specifics of Mr. Schad's case and I would have to review the materials again as well as listen to the presenters to make a final decision.
11. I have not discussed the Mr. Schad. matter with other members of the Board in violation of any Arizona open meetings law in a break room or anywhere else. I never stated that I am 'always a no' vote. I never stated "I could not put my name on that. What would the Governor think." Brian Livingston or Melvin Thomas never told me that they would vote no to recommend clemency for Mr. Schad.
12. I have no predisposition on how I will vote regarding Mr. Schad's request for Clemency.

Elen Kirschbaum

SUBSCRIBED AND SWORN to before me this 30th day of September, 2013.

Maria S. Green

Notary Public

My Commission expires:

Nov. 18, 2014



# Exhibit D

**AFFIDAVIT**

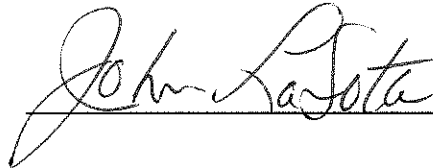
STATE OF ARIZONA     )

) ss.

County of Maricopa     )

JOHN LASOTA, having first been duly sworn, depose and state as follows:

1. I am a member of the Arizona Board of Executive Clemency and have been since 2010.
2. As a Board member I vote based on the materials presented, the verbal testimony and the evidence offered at a hearing.
3. I always vote independently.
4. I have never been pressured on how to vote in a particular case either by the Governor or Governor's staff. My decisions are never influenced by how they would be perceived by the Governor. My Board membership is not at risk by how I vote. I vote based on my experience and beliefs.
5. I have not discussed Mr. Schad's case or how I would vote with anyone else in violation of any Arizona Law.
6. I have no prejudice or predisposition regarding Mr. Shad's case.
7. I am not aware nor did I participate in any conversations concerning how Board members would vote regarding Mr. Schad.



SUBSCRIBED AND SWORN to before me this 30th day of September, 2013.



Notary Public

My Commission expires:

Nov 18, 2014





# Exhibit E

**AFFIDAVIT**

STATE OF ARIZONA        )

                              ) ss.

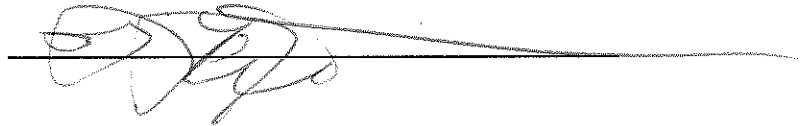
County of Maricopa        )

BRIAN L. LIVINGSTON, having first been duly sworn, depose and state as follows:


1. I was appointed to the Arizona Board of Executive Clemency in April of the year 2012.
2. I agreed to become a member of the Board of Executive Clemency on April 3, 2012. Soon thereafter I received a letter from Governor Brewer noting my date of acceptance. Upon completion and submission of my loyalty oath and other forms, I was named to the Board officially on April 19, 2013. This was at or near the same time former Board Chairman Jesse Hernandez and member Melvin Thomas were appointed to the Board. I assumed the Chairmanship of the Board on August 16, 2013 and was appointed Chairman of the Board on August 19, 2013. I currently serve in this position.
3. I knew at the time of my hiring on the Board, as a Board member, that I would be replacing a current board member whose term had expired. I was never told that I was replacing a board member because of how the Board member voted. I was told that I was chosen to be a member of the Board because I was known in governmental and other public circles as having an independent voice and opinion. Since becoming a member of the Board I was told by two board members, Mrs. Kirschbaum and Mr. Thomas, that past board members felt they were not being reappointed to a board position because of how they had voted in the past. However, I never saw or read any document, letter or email that substantiated these opinions and comments.
4. During the time I served as a Board member I would cast my vote based on the written material I was presented, the verbal testimony and evidence offered at a hearing, and only after due contemplation and examination of all the facts was completed.
5. I have never been asked to cast a vote in a particular manner. Nor have I felt pressured by any internal or external person or source to vote in a particular manner. If any such action would have occurred I would have reported it immediately to the Board Chairman. If it would occur to me or any Board member now I would report it to a law enforcement entity for further review and investigation.
6. If I felt a conflict of interest was possible or could be perceived by the public I have made it a practice to recuse myself from a particular hearing. I have taken such action on several occasions to insure a fair hearing would be conducted. I recuse myself if I knew personally the investigating officer and had social contact with them regularly or if I knew the inmate from a

past law enforcement contact or briefing. When I did recuse myself I would leave the hearing room and wait until summoned for the next hearing. I would offer no information to the Board before or after the hearing was conducted just in case the matter was continued or re-calendared for reconsideration.

7. I have no recollection of Mr. Hernandez telling the Board that the Governor or a member of her staff was unhappy with a vote cast by me or the Board. If such a statement was made I took no notice of it nor would I have if it had been recognized. Any vote I have cast is based on the facts and evidence presented as well as personal contemplation and reflection.
8. I was once criticized by Mr. Hernandez for being too probative in my questions to individuals at hearings. I explained to Mr. Hernandez that my questions are made to seek clarity of the information or testimony provided. I ask such detailed questions so I have a true understanding of what transpired during and after a specific event. Such questioning assists me in my final determination process. After my initial conversation on this topic the matter was not brought up again by Mr. Hernandez.
9. Conversations with Board members about a specific matter or upcoming hearing were not conducted in my presence. I did not discuss Mr. Schad's case with Ellen Kirschbaum or Melvin Thomas in a break room. Ellen Kirschbaum or Melvin Thomas never told me that they would vote no to recommend clemency for Mr. Schad.
10. I will independently decide Mr. Schad's request for clemency when it is before the Board.

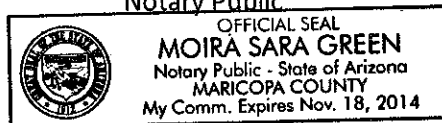


SUBSCRIBED AND SWORN to before me this 30th day of September, 2013.



My Commission expires:

Nov 18, 2014



# Exhibit F

## SUPREME COURT OF ARIZONA

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-90-0247-AP
Appellee,	)	
	)	Maricopa County
v.	)	Superior Court
	)	Nos. CR-163419;
SAMUEL VILLEGAS LOPEZ,	)	LC2012-000264-001
	)	
Appellant.	)	ORDER GRANTING STAY
	)	AND RESETTING DATE
	)	OF EXECUTION
		<b>FILED 5/15/2012</b>

Samuel Villegas Lopez raised several claims in a superior court special action relating to his application to the Board of Executive Clemency for commutation and reprieve. The superior court found two of those claims colorable and set an evidentiary hearing for July 16, 2012. One of these claims is that three newly appointed members of the Board of Executive Clemency have not received all training specified by A.R.S. § 31-401(C). The State does not contest that these members have not yet completed that training.

The superior court's minute entry clearly implies that, were it within that court's power, it would have stayed Lopez's execution. See Ariz. R. Crim. P. 32.4 (providing that "no stay of execution shall be granted upon the filing of a successive petition except upon separate application for a stay to the Supreme Court"). That minute entry reaches us on the very eve of Lopez's scheduled execution. Without a stay, the case would be rendered moot. Without addressing the merits of the § 31-401(C) issue, we conclude that the interests of justice are best served by staying the pending execution and forthwith issuing under separate cover a new warrant of execution for June 27,



2012. The period between now and the new execution date will allow training of new Board members and a clemency hearing to be subsequently held by the Board, if the Board should elect such a course of action. That procedure would moot Lopez's claim under § 31-401(C).

Unlike the superior court, we do not find colorable Lopez's claim that appointment of the new Board members violates § 31-401(B), which requires that members "shall have demonstrated an interest in the state's correctional program." Like the superior court, we do not find colorable other claims raised by Lopez in the special action.

We therefore grant the application for stay of execution of the sentence of death and will reschedule the execution for June 27, 2012.

DATED this \_\_\_\_\_ day of May, 2012.

For the Court:

\_\_\_\_\_  
Rebecca White Berch  
Chief Justice

TO:

Kent E Cattani  
Susanne Bartlett Blomo  
David R Cole  
Joe Sciarrotta  
Julie S Hall  
Denise I Young  
Kelley Henry  
Samuel Villegas Lopez, ADOC 043833, Arizona State Prison,  
Florence - Eyman Complex-Browning Unit (SMU II)  
Joseph C Kreamer  
Douglas L Rayes  
Diane Alessi  
Charles Ryan  
Lance Hetmer  
Dawn Northup  
Jesse Hernandez

Dale A Baich  
Amy Sara Armstrong

## ER Page 193

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

EDWARD HAROLD SCHAD, JR.,

Plaintiff,

vs.

JANICE K. BREWER,  
Governor Of The State Of Arizona, In  
Her Official Capacity,

SCOTT SMITH,  
Chief Of Staff To Governor Brewer,  
In His Official Capacity

BRIAN LIVINGSTON,  
Chairman and Executive Director,  
Arizona Board of Executive Clemency

JOHN "JACK" LASOTA,  
Member, Arizona Board of Executive  
Clemency, In His Official Capacity

ELLEN KIRSCHBAUM,  
Member, Arizona Board of Executive  
Clemency, In Her Official Capacity

DONNA HARRIS,  
Member, Arizona Board of Executive  
Clemency, In Her Official Capacity

Defendants.

No. 2:13-cv-01962-ROS

**REPLY TO RESPONSE TO  
MOTION FOR A  
TEMPORARY  
RESTRAINING ORDER  
AND/OR PRELIMINARY  
INJUNCTION**

DEATH PENALTY CASE -  
EXECUTION SET FOR  
OCTOBER 9, 2013 10:00 AM

Denise Young, Esq.  
Arizona Bar No. 007146  
2930 North Santa Rosa Place  
Tucson, AZ 85712  
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Counsel for Petitioner Schad



Defendant's Response in Opposition (District Court Docket Entry ("Dkt.") 9.) demonstrates that there is a factual dispute on the critical question of whether Plaintiff, Edward Harold Schad, Jr., will receive a clemency hearing that will comport with Due Process of Law. It is important to keep in mind that this motion is for temporary relief only. At this stage, Mr. Schad does not seek a permanent injunction, but rather he seeks a temporary and/or preliminary injunction so that he may conduct expedited discovery, including requests for production of documents and depositions. This is necessary for Mr. Schad to be able to fully plead his claims without this action becoming moot due to his execution. Defendants' Response highlights the need for Plaintiff to be granted a temporary and/or preliminary injunction so that discovery can commence.

## **I. Defendants Misunderstand Plaintiff's Claims**

Plaintiff maintains that the ousting of Board Members Duane Belcher, Marilyn Wilkens, and Ellen Stenson served as an object lesson for what would happen to board members whose actions displeased Defendant Governor Brewer, or her agent, Defendant Scott Smith. The lesson was reinforced by Defendant Smith in his repeated "come to Jesus" meetings with Mr. Hernandez. Defendant Smith has not denied the meetings took place. Both Duane Belcher and Jesse Hernandez aver that such meetings took place. *See* Declaration of Duane Belcher

(Dkt. 1-5 at para 4); Declaration of Jesse Hernandez (Dkt. 1-9 at paras 4-6). Accordingly, for the purpose of this hearing, this matter must be accepted as true.

Defendants' self-serving declarations wherein they promise to be fair and unbiased do not address the core of Plaintiff's claim, *viz*, that Defendant Brewer through her agent Defendant Smith, sought to intimidate board members in order to produce a desired result with respect to their votes in certain cases. *Young v. Hayes*, 218 F.3d 850 (8<sup>th</sup> Cir. 2000) (state officials must refrain from frustrating clemency process by threatening or intimidating board members, from engaging in a mere farce of a clemency proceeding, and from violating governing law.)

Defendants ignore the import of Plaintiff's evidence. Declarants Belcher, Wilkens, and Stenson all establish the conduct on the part of Defendant Smith, *i.e.* threatening and intimidating behavior relating to votes in cases. Belcher Declaration (Dkt. 1-5 at paras 4-5); Declaration of Marilyn Wilkins (Dkt. 1-7 paras. 4, 7); Declaration of Ellen Stenson (Dkt. 1-6 at paras 4-6). Contrary to Defendants' response, the message was delivered loud and clear—do not vote to recommend clemency in high profile cases.<sup>1</sup> Defendant Brian Livingston swore in his affidavit, "Since becoming a member of the Board I was told by two board

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<sup>1</sup> In their carefully crafted Response, Defendants do not deny that Defendant Smith, acting on behalf of Defendant Brewer, sought to deliver this message through meetings with Belcher and Hernandez. Defendants also do not deny the allegation that someone acting on behalf of Defendant Brewer sent a letter to an as yet unknown Board Member expressing displeasure with the votes in a particular case. Declarant Thomas has a vivid memory of the letter. (Dkt. 1-8) He does not retract his memory in the Affidavit he provided for Defendants. (Dkt 9-1 at Exhibit B.)

members, Mrs. Kirschbaum and Mr. Thomas, that past board members felt they were not being reappointed to a board position because of how they voted in the past.” (Dkt 9-1 at Exhibit E.<sup>2</sup>) Former Board Member Melvin Thomas corroborates Livingston.

The other members of the Board while I served were also aware that their predecessors had lost their jobs because of how they voted. I knew that it was possible that I too could lose my job as a result of how I voted, but this did not affect my votes.

Declaration by Melvin Thomas (Dkt. 1-8 at para 4).

The former board members establish that the Governor and/or her chief of staff were upset by the votes in favor clemency for Mr. Flibotte and Mr. Macumber. Former Chairman Belcher confirms that Defendant Smith expressed his displeasure in a meeting with Belcher. (Dkt. 1-5 at para 4.) Former Chairman Hernandez also describes meetings with Defendant Smith where he made it clear that the Governor did not want another Macumber or Flibotte. (Dkt. 1-9 at paras 4-5.) This evidence, which is not disputed, corroborates Smith’s pattern and practice of calling in the Board Chairmen to exert pressure regarding their votes. These declarations are corroborated by the memory of former member Thomas who recalls Mr. Hernandez informing the Board about the Governor’s displeasure with the vote in a certain case. (Dkt. 1-8 at para 5.) Mr. Thomas also confirms this point

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<sup>2</sup> This Affidavit seems to contradict the Affidavit of Ellen Kirschbaum. (Dkt. 9-1 at Exhibit C, para 3.)

of Mr. Hernandez's declaration: "Chairman Hernandez stated to the Board members that the Governor had been unhappy with one of our decisions." (Dkt. 1-8 at Exhibit B, para 6.)

Defendants response to this evidence is that no Board Member has a right to their position on the Board. That is true of any employee. Each member does have a financial interest in their job. The attempt on the part of Defendants Smith and Brewer to frustrate the clemency process by holding the threat of losing their seat on the Board over the heads of board members violates minimal due process in a capital case.

Defendants' argument that the Court should presume the Board Members unbiased, in the face of the evidence brought forth thus far, is unavailing at this preliminary stage. The state cases cited by Defendants are readily distinguishable. The cases are not in the context of a complaint brought pursuant to 42 U.S.C. §§ 1983 and 1985, nor do they deal with a pre-hearing challenge. Rather, each is an appeal from an adverse decision by an administrative board. The cases do not deal with the same due process concerns raised in the context a capital prisoner's request for clemency.

Defendants cite *Havasu Heights Ranch and Dev. Corp v. Desert Valley Wood Prods.*, 807 P.2d 1119 (Ariz. Ct. App. 1990). *Havasu Heights* relies on the

United States Supreme Court decision in *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), which supports Plaintiff. In *Withrow*, the Court wrote:

Not only is a biased decisionmaker constitutionally unacceptable but ‘**our system of law has always endeavored to prevent even the probability of unfairness.**’ *In re Murchison*, *supra*, 349 U.S., at 136, 75 S.Ct., at 625; *cf. Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

*Id.* (footnotes omitted)(emphasis supplied).<sup>3</sup>

## II. Defendants’ Character Attack On Declarant Hernandez Is Inappropriate And Irrelevant For Purposes Of The Instant Motion.

Defendants focus solely on attacking Jesse Hernandez’s sworn declaration that he overheard board members discussing Mr. Schad’s case expressing concern about the Governor’s reaction to a favorable vote in the Schad case. Defendants deny that they participated in such conversations. This denial creates a factual dispute which requires discovery. But Defendants go further in an all-out character assault on Mr. Hernandez. Defendants Brewer and Smith hand-picked Mr. Hernandez to be the Chairman of the Board, not Plaintiff. Mr. Hernandez owes no

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<sup>3</sup> *Lathrop v. Ariz. Bd. of Chiropractic Examiners*, 894 P.2d 715 (Ariz. Ct. App. 1995) is similarly inapposite. *Lathrop* did not involve a situation where the Board was subjected to outside influence of pressure.



allegiance to Mr. Schad and certainly has every reason to be hostile to Schad's current counsel who vocally criticized his appointment to the Board in 2012.

The viciousness with which Defendants have attacked Hernandez certainly raises questions as to Defendants motives. Further, the heavily redacted (and incomplete)<sup>4</sup> complaint created by the Department of Administration raises more questions than it answers and has questionable relevance to the matter before the Court for a temporary and/or preliminary injunction.<sup>5</sup>

Defendants focus on Hernandez is far from unassailable and, at best, raises factual issues for which discovery is necessary. Further, Defendants focus on Hernandez is irrelevant in the context of Plaintiff's motion.

### **III. On Balance Plaintiff Has Established His Entitlement to Temporary Relief Where Failure to Issue a Temporary Restraining Order and/or Preliminary Injunction Will Result in the Loss of His Life Without Giving Him an Opportunity to Fully Develop the Facts of His Claim**

In *Young* the Eighth Circuit upheld the preliminary injunction to permit factual development where the death row prisoner brought forth evidence of

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<sup>4</sup> Attachments referred to in the DOA report do not accompany the exhibit filed with the Court.

<sup>5</sup> There is no need for this Court to spend its times during a TRO hearing trying to parse the hearsay allegations in the DOA complaint against Hernandez. It bears noting, however, that Defendants appear to misrepresent the finding of the investigation claiming that the DOA found that Hernandez "engaged in misconduct when he accepted basketball tickets[.]" (Dkt. 9 at 4.) The DOA report did not find that Hernandez accepted tickets. It noted that others claimed Hernandez "joked" about receiving tickets, which is at most ambiguous. (Dkt. 9-1 at Exhibit A, p. 13.) Hernandez, to Schad's knowledge and belief, was not provided with a copy of the DOA report prior to his resignation, and has not had an opportunity to respond to the allegations. Again, Defendants Brewer and Smith placed Hernandez in his position.

official intimidation with the intent to tamper with clemency proceedings. Plaintiff has similarly brought forth such evidence. Defendants do not address the *Young* case in their response.

Defendants agree that Plaintiff is entitled to some measure of federal due process at his clemency hearing. (Dkt 9 at 6-7.) Defendants do not dispute that state official's actions designed to frustrate the fairness of a clemency hearing constitute a violation of federal due process.

Defendants fail to appreciate the importance of the fact that this case deals with a capital prisoner's due process right to a fair clemency hearing. *Woodard* acknowledges that, "[a] prisoner under a death sentence remains a living person and consequently has an interest in his life." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288, 118 S. Ct. 1244, 1253, 140 L. Ed. 2d 387 (1998)(O'Connor, J. concurring). This Court can weigh this factor heavily in determining whether to grant a TRO/Preliminary Injunction.

Defendants allege that Schad "misconstrues the basic function of clemency." Disturbingly, it is Defendants who fail to acknowledge or recognize the important role that clemency plays as the fail-safe against unjust executions. *See Herrerra v. Collins*, 506 U.S. 390, 415 (1993) ("Executive clemency has provided the "fail safe" in our criminal justice system.") While Plaintiff agrees that it is in the public's interest to ultimately have his case aired before a fair board, Plaintiff

cannot achieve that goal at this time. Further, given the disturbing allegations that have only recently come to light, the public is entitled to a full factual development regarding the alleged misdeeds of Defendant Smith, on behalf of Defendant Brewer, and the impact those misdeeds have had on the workings of the Board.

Defendants do not address Schad's argument that no harm will befall any entity by granting Schad a TRO/preliminary injunction. The Court should weigh this factor in Plaintiff's favor.

#### **IV. CONCLUSION**

At this preliminary stage, Plaintiff need not establish his conclusive entitlement to relief, as Defendants suggest. Plaintiff has presented enough to warrant interim relief, followed by expedited discovery and a full hearing, after which this Court should fashion a remedy which will ensure the fairness of the Board, including insulating Board members from intimidation and retaliation designed to frustrate the clemency process.

WHEREFORE, the motion should be granted.

Respectfully submitted this 1<sup>st</sup> day of October, 2013.

Kelley J. Henry  
Supervisory Asst. Federal Public Defender  
Denise Young, Esq.

By s/Kelley J. Henry  
Counsel for Plaintiff Edward Schad

### **Certificate of Service**

I hereby certify that on October 1, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona. I also certify that I emailed a copy of the same to counsel, Kelly Gibson as well as to Mr. Jeffrey Zick and Mr. Jon Anderson, Assistant Attorneys General. I further certify that I emailed copies to Ms. Kristine Fox, Capital Case Staff Attorney for the District of Arizona and Ms. Margaret Epler, Capital Case Staff Attorney for the Sixth Circuit.

*Kelley J Henry*

Counsel for Edward Schad

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

<p>EDWARD HAROLD SCHAD, JR.,</p> <p>Plaintiff,</p> <p>v.</p> <p>JANICE K. BREWER, Governor Of the State of Arizona in Her Official Capacity,</p> <p>SCOTT SMITH, Chief of Staff to Governor Brewer, In His Official Capacity</p> <p>BRIAN LIVINGSTON, Chairman and Executive Director, Arizona Board of Executive Clemency</p> <p>JOHN "JACK" LASOTA, Member, Arizona Board of Executive Clemency, In his Official Capacity</p> <p>ELLEN KIRSCHBAUM, Member, Arizona Board of Executive Clemency, In Her Official Capacity</p>	<p>Case No. 2:13-cv-019162-ROS</p> <p><b>EXPEDITED MOTION TO QUASH SUBPOENAS TO PRODUCE DOCUMENTS</b></p> <p><b>CAPITAL CASE</b></p> <p><b>EXECUTION SET FOR OCTOBER 9, 2013</b></p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



DONNA HARRIS, Member, Arizona Board of Executive Clemency, In Her Official Capacity,  Defendants.	
---------------------------------------------------------------------------------------------------------------	--

Defendants Governor Janice K. Brewer, Chief of Staff, Scott Smith, Chairman/Executive Director of the Arizona Board of Executive Clemency, Brian Livingston, Board Member, John “Jack” LaSota, Board Member Ellen Kirschbaum, and Board Member Donna Harris files this Motion to Quash two Subpoenas to Produce Documents.

Schad, after 3:00 pm yesterday, served on the Office of the Governor of Arizona and the Board of Executive Clemency two subpoenas for production of over four (4) years of documents. Attached as Exhibits A and B. The subpoenas require production of the documents at 1:00pm today, only six (6) business hours after they were served. Pursuant to Federal Rule of Criminal Procedure Rule 45(c)(A)(i) which states the issuing Court must quash a subpoena that fails to allow a reasonable time to comply, the Defendants request that this Court quash the subpoenas.

The fact that Schad waited to the very last minute to issue the subpoenas is very telling. Schad knew for days or weeks if not months that he would be filing his Complaint and requesting a Temporary Restraining Order/Preliminary Injunction (“TRO”), yet he waited until late the day before the scheduled evidentiary hearing to issue the subpoenas.<sup>1</sup> Schad is simply trying to manufacture a reason to delay the TRO

<sup>1</sup> Ms. Henry, counsel for Schad, has previously asserted these similar claims of bias in her representation of Samuel Lopez in Maricopa County Superior Court Case No. LC2012-000264. In that case, Ms. Henry attacked the qualifications of Jesse Hernandez and the appointment process. Ms. Henry had the opportunity to seek a public records request in order to get the information she has requested in these last minute subpoenas. These issues are not new and the subpoenas are not a ground for delay.

hearing and/or his scheduled commutation/reprieve hearing. The Court should not be swayed by this tactic.

Moreover, Schad's purpose for engaging in this fishing expedition is to try to find facts that might substantiate his claims when he currently has no genuine facts. His request for these documents bolsters the point that Schad cannot meet his required burden before this Court can issue a TRO.

The real issue before this Court is that Schad is claiming that members of the Arizona Board of Executive Clemency ("Board") cannot and will not give him a fair clemency hearing. Schad's argument that the Governor influenced the Board by failing to re-appoint prior members and thereby violates his right to due process is without merit. "Courts have uniformly rejected allegations that due process is violated by a governor who adopts a general policy of not granting clemency in capital cases." *Anderson v. Davis*, 270 F.2d 674 (9<sup>TH</sup> Cir. 2002).

Although Schad is pursuing yet another attempt at discovery, the very Board members who will decide whether Schad will receive a recommendation for commutation will be available to testify at the TRO hearing. Their testimony, if needed beyond their affidavits, is sufficient and dispositive for this Court to make the determination whether Schad meets his burden of proof that he has a reasonable likely of success on the merits of that question. The current Board members affidavits stating that they are not biased and will be fair and impartial, standing alone, defeat the TRO. *Parker v. State Board of Pardons and Paroles*, 275 F.3d 1032 (11<sup>th</sup> Cir. 2001) (Court denied inmate's request for a TRO even with the Chairman's past statement that the Board would never grant clemency because court found that the Chairman presently state he could fairly review the clemency application and have an open mind).

## CONCLUSION

Since the Board members have asserted they will provide Schad a fair and impartial commutation/reprieve hearing, all the other side issues in this case including the subpoenaed documents are irrelevant. The Defendants respectfully request that his Court quash these subpoenas.

Dated this 1<sup>th</sup> day of October, 2013.

THOMAS C. HORNE  
Attorney General

By: /s Kelly Gillian-Gibson  
Kelly Gillilan-Gibson  
Brian P. Luse  
Attorneys for Defendants

Electronically filed this  
1<sup>st</sup> day of October, 2013 with:

Clerk of the U.S. District Court  
for the District of Arizona  
401 W. Washington  
Phoenix, Arizona 85003

**COPY** of the foregoing served  
Electronically this  
1<sup>st</sup> day of October, 2013

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Attorneys for Plaintiff

By: Kelly Gillilan-Gibson  
3560317

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

EDWARD HAROLD SCHAD, JR.,

Plaintiff,

vs.

JANICE K. BREWER,  
Governor Of The State Of Arizona, In  
Her Official Capacity,

SCOTT SMITH,  
Chief Of Staff To Governor Brewer,  
In His Official Capacity

BRIAN LIVINGSTON,  
Chairman and Executive Director,  
Arizona Board of Executive Clemency

JOHN "JACK" LASOTA,  
Member, Arizona Board of Executive  
Clemency, In His Official Capacity

ELLEN KIRSCHBAUM,  
Member, Arizona Board of Executive  
Clemency, In Her Official Capacity

DONNA HARRIS,  
Member, Arizona Board of Executive  
Clemency, In Her Official Capacity

Defendants.

No. 2:13-cv-01962-ROS

**RESPONSE TO MOTION TO  
QUASH**

DEATH PENALTY CASE -  
EXECUTION SET FOR  
OCTOBER 9, 2013 10:00 AM



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Counsel for Petitioner Schad

Defendants Motion to Quash is filled with fanciful and ludicrous allegations and personal attacks on Plaintiff's counsel evidencing a bias on the part of Defendant Board Members against Plaintiff's advocate.

First, Plaintiff did not wait until the last moment to issue subpoenas. Plaintiff cannot issue a subpoena without a reason. Plaintiff did not have grounds for his complaint until all of the declarations were received and after he gave Defendants the opportunity to recuse themselves from the clemency hearing.<sup>1</sup> Plaintiff moved with lightning speed to file the complaint. Once filed, Plaintiff was informed by Court staff that he would need to file his TRO motion forthwith, which he did. The Court granted Plaintiff a hearing on his TRO at the close of business on Friday, September 27, 2013 while Plaintiff's counsel was still in Nashville. The hearing was scheduled for the following Monday. Plaintiff accomplished this while simultaneously conducting appellate briefing in the habeas case in the Ninth Circuit.<sup>2</sup>

It is Defendants filing on September 30, 2013 which created the factual dispute which gave rise to the request for subpoenas. Plaintiff is not attempting to delay the TRO hearing. Plaintiff is prepared to meet his burden of proof. It is Defendants who are attempting to convert the TRO/PI hearing into something

<sup>1</sup> The Lopez litigation was different.

<sup>2</sup> Plaintiff apologizes for the informal nature of the pleading. At present it is one hour before the hearing. Plaintiff will supplement his response orally.

more. Further, there is nothing shocking or surprising about a civil complainant requesting discovery after the complaint has been filed and the Defendants dispute the facts. Plaintiff agrees that it would be preferable for this discovery to take place on a different schedule.

Defendants citation to *Anderson v. Davis*, 270 F.3d 674 (9TH Cir. 2002) is interesting for two reasons. One, the portion of the citation they choose is a quasi-admission that Defendant's Brewer and Smith's intent is to make sure that no death row inmate ever receives clemency, substantiating claim one and claim three of the complaint. But the entire quote reads:

However, on the assumption that there might be a ground in this matter for the denial of clemency-as suggested by Justice O'Connor in *Woodard*-that would offend the Constitution, we have scoured the record to see if there is any such problem in this case, and we find none. Anderson does not present us with any suggestion that race, religion, **political affiliation**, gender, nationality, etc. are involved in this case. He has not alleged that the Governor's procedures are "infected by bribery, **personal or political animosity**, or the deliberate fabrication of false evidence." *Woodard*, 523 U.S. at 290-91, 118 S.Ct. 1244 (Stevens, J., concurring and dissenting). Nor does he allege that coin-flipping or **another capricious decisionmaking process is present**. Furthermore, Anderson does not claim he has been misled in any way by the Governor, or that he failed to receive adequate notice of the issues to be considered in his request for clemency. In this respect, Anderson's case is easily distinguishable from the claims presented to this Court by way of mandamus in *Wilson v. United States Dist. Court (Siripongs)*, 161 F.3d 1185 (9th Cir.1998).

*Id.* (emphasis supplied).

Plaintiff has raised a claim that the board cannot be neutral, no matter how much they may want to be, because of the actions of Defendants Smith and Brewer, actions which are still not denied. The *Young* case establishes his right to a TRO/PI. Defendant Boar Members' self-serving affidavits are not entitled to a rebuttable presumption of credibility. *Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528, 553 (8th Cir. 2004). Plaintiff is entitled to offer proof, and conduct discovery, disputing them.

WHEREFORE, the motion should be denied.

Respectfully submitted this 1<sup>st</sup> day of October, 2013.

Kelley J. Henry  
Supervisory Asst. Federal Public Defender  
Denise Young, Esq.

By s/Kelley J. Henry  
Counsel for Plaintiff Edward Schad

### **Certificate of Service**

I hereby certify that on October 1, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona. I also certify that I emailed a copy of the same to counsel, Kelly Gibson and Brian Luse. I further certify that I emailed copies to Ms. Kristine Fox, Capital Case Staff Attorney for the District of Arizona and Ms. Margaret Epler, Capital Case Staff Attorney for the Sixth Circuit.

Kelley J Henry

Counsel for Edward Schad



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Edward Harold Schad, Jr.,	)	
Robert Glen Jones, Jr.,	)	
	)	
Plaintiffs,	)	CV-13-1962-PHX-ROS
	)	
vs.	)	Phoenix, Arizona
	)	October 1, 2013
Janice K. Brewer, et al.,	)	3:53 p.m.
	)	
Defendants.	)	
	)	
	)	

BEFORE: THE HONORABLE ROSLYN O. SILVER, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING - VOLUME I

(Pages 1 through 63, inclusive.)

Official Court Reporter:  
Linda Schroeder, RDR, CRR  
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Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

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UNITED STATES DISTRICT COURT

INDEX OF WITNESSES

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<u>PLAINTIFFS:</u>			

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INDEX OF EXHIBITS

<u>EXHIBIT NO.:</u>	<u>DESCRIPTION:</u>	<u>RECEIVED:</u>
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1 (Plaintiffs appearing via video teleconference.)

2 THE CLERK: This is case number CV 13-1962, Schad,  
3 et al., versus Brewer, et al., on for temporary restraining  
4 order hearing. Counsel, please announce for the record.

5 MS. HENRY: Kelley Henry on behalf of plaintiff Edward  
6 Schad.

7 THE COURT: Thank you.

8 MR. BAICH: Dale Baich and Sarah Stone on behalf of  
9 plaintiff Jones.

10 THE COURT: Thank you.

11 MS. GILLILAN-GIBSON: Kelly Gibson on behalf of Janice  
12 Brewer, the Governor; Scott Smith, Chief of Staff; Brian  
13 Livingston, Chairman of the Arizona Board of Executive  
14 Clemency.

15 THE COURT: I'm sorry. And I don't have -- For some  
16 reason I have your name listed in the front here. Kelly  
17 Livingston, right?

18 MS. GILLILAN-GIBSON: No. Kelly Gibson.  
19 Mr. Livingston is the Chairman of the Arizona Board of  
20 Executive Clemency.

21 THE COURT: Right. And you are? What's your name?  
22 I'm sorry?

23 MS. GILLILAN-GIBSON: My name is Kelly Gibson. In my  
24 written pleadings I have a hyphenated name, Your Honor, but for  
25 purposes of this, Gibson is fine.

UNITED STATES DISTRICT COURT

1 THE COURT: Yes, I do remember that now. And who else  
2 is with you?

3 MR. LUSE: Good afternoon, Your Honor. Brian Luse,  
4 Assistant Attorney General, on behalf of the defendants.

5 THE COURT: Okay. All right. And we have Mr. Schad.  
6 Are you there?

7 MS. HENRY: Your Honor, I believe --

8 DEFENDANT SCHAD: We're here.

9 THE COURT: Can you hear me?

10 DEFENDANT SCHAD: Yes, ma'am.

11 THE COURT: And also Mr. Jones? Mr. Jones?

12 DEFENDANT JONES: Hello? Yes, ma'am.

13 THE COURT: Can you see me and hear me?

14 DEFENDANT JONES: I can see you, but I can't hear you.  
15 But he's going to listen to you and let me know what's going  
16 on.

17 THE COURT: Well, you must have heard me. You must  
18 have heard me because you answered the very question I asked.

19 Okay. Let's try again. Mr. Schad, can you hear me?

20 DEFENDANT SCHAD: Yes, ma'am.

21 THE COURT: And, Mr. Jones, can you hear me?

22 DEFENDANT JONES: Hello?

23 THE COURT: Well, if you answered yes, that means you  
24 can hear me.

25 MR. BAICH: Your Honor, it appears that the prisoners

UNITED STATES DISTRICT COURT



1 are sharing a handset of a telephone.

2 THE COURT: Okay.

3 MS. SALLY ARVIZU: I don't believe they have a  
4 microphone or speaker system. It sounds like they have a  
5 telephone handset they both have to listen to.

6 THE COURT: They're going to have to share?

7 MS. SALLY ARVIZU: Uh-hmm.

8 THE COURT: Okay. Then what we will do is take it as  
9 slowly -- We will take this as slowly as possible. Mr. Schad  
10 and Mr. Jones, you are not to ask questions. You have very  
11 competent counsel representing you. Unless we need to take a  
12 break for your counsel to speak with you, you are here just to  
13 allow you to be present as you are entitled to in this 1983  
14 action.

15 All right. I think you understand, and we will  
16 proceed.

17 First of all, as we have the expedited motion to quash  
18 subpoenas to produce documents, let me hear from the defendants  
19 and Ms. Gibson.

20 MS. GILLILAN-GIBSON: Yes, Your Honor. The defendants  
21 filed the motion to quash. The Governor's Office as well as  
22 the Arizona Board of Executive Clemency got a subpoena to  
23 produce documents from a four-year period of time yesterday  
24 close to 4:00 p.m.

25 There's a couple bases for the objection. The first

UNITED STATES DISTRICT COURT

1 basis is these documents are really irrelevant. If you read  
2 our expedited motion to quash, the issue before this Court for  
3 purposes of deciding a TRO is whether the current Board members  
4 have a bias that prevents them from executing their duties by  
5 law and conducting a Clemency hearing where they will provide  
6 both Mr. Schad and Mr. Jones with due process of law.

7 THE COURT: Let me interrupt you for a moment so  
8 that -- And I will do so along the way, and I apologize for  
9 doing so, but we don't -- it's already 4:00 today.

10 Isn't there a portion of their request which might be  
11 relevant, assuming it exists, and that is if there were  
12 communications between the Governor or the Governor's staff to  
13 the present Board?

14 MS. GILLILAN-GIBSON: Yes, if they existed --

15 THE COURT: And if those communications, if those  
16 communications were of the nature that the plaintiffs allege  
17 were the same type of communications that allegedly took place  
18 with former Board members, wouldn't that be relevant?

19 MS. GILLILAN-GIBSON: It is relevant, Your Honor. The  
20 defendants adamantly deny that those conversations took place.  
21 I assume you're looking into the affidavit by Mr. Hernandez  
22 alleging communications --

23 THE COURT: What I -- I know you adamantly deny that.  
24 But this is on a motion to quash. And what they're asking for  
25 are -- do any of those -- have there been any communications?

1 And so essentially they want to see the communications if there  
2 ever have been that would be of a like nature of the alleged  
3 communications that took place between Mr. Scott and the former  
4 members.

5 MS. GILLILAN-GIBSON: Right. Then I would turn to our  
6 second part of our objection, which is the timeliness of the  
7 subpoena, Your Honor.

8 THE COURT: Well, let's -- let me answer -- let's have  
9 you answer that. Would that be relevant if it existed?

10 MS. GILLILAN-GIBSON: Excuse me? Would the documents  
11 be relevant if it existed?

12 THE COURT: Yeah. Say, for example, what they are  
13 hoping to find, and that is all that we have on a discovery  
14 request, is they are hoping to find something of the nature  
15 that they allege occurred, that is, communications by the  
16 Governor or by somebody on behalf of the Governor of the same  
17 nature that they allege occurred -- and there are affidavits of  
18 such -- between Mr. Scott and previous Board members. So if  
19 those existed, wouldn't that be relevant?

20 MS. GILLILAN-GIBSON: Relevant but not necessary, Your  
21 Honor. We have the current Board members here who have  
22 submitted affidavits saying that conversations regarding  
23 Mr. Schad did not take place, that no one is influencing them  
24 on how they vote. And so while it may be relevant, it's going  
25 to be duplicative of what can be here today.

1 THE COURT: Okay. Can they answer the question as to  
2 whether or not those documents exist, whether or not they  
3 received? Wouldn't that be the most relevant issue here today?

4 MS. GILLILAN-GIBSON: Yes, yes. I think the witnesses  
5 here --

6 THE COURT: So then what -- As I see it, I'm going to  
7 hear from the plaintiffs' counsel about this and ask if  
8 that's -- is that in fact what you're looking for?

9 Ms. Henry, is that what you're looking for?

10 MS. HENRY: Yes, Your Honor, that's exactly what we're  
11 looking for.

12 THE COURT: So if they took the stand and you had the  
13 opportunity to vigorously cross-examine them, as I know you  
14 will, and they were to say we never received those documents,  
15 would that be enough?

16 MS. HENRY: No, Your Honor, it would not be enough. I  
17 mean, we have conflicting affidavits whether or not the  
18 documents exist or don't exist, so we have a fact dispute here.

19 THE COURT: Well, conflicting affidavits. Okay. Let  
20 me ask you this.

21 Conflicting affidavits from the present Board members?

22 MS. HENRY: Yes, ma'am. Well, no. I'm sorry. Melvin  
23 Thomas has given a declaration that's on file with this Court  
24 that's attached to our complaint that says he has observed a  
25 letter that was from the Governor's Office directed to a Board

1 member. I believe his testimony will be that he can place the  
2 timing of that letter as coming from this current  
3 administration.

4 He has thus far been unwilling to tell us who showed  
5 him the letter because he fears personnel action against that  
6 individual.

7 THE COURT: Showed him, and what was the content of  
8 the letter?

9 MS. HENRY: As I understand the content of the  
10 letter -- and Mr. Thomas can testify -- is that it was from  
11 someone in the Governor's Office in the administration, a  
12 person I don't know, complaining about a vote in a particular  
13 case that came before the Board. My understanding of the  
14 letter --

15 THE COURT: Was this before -- Was this at the time  
16 the present Board was composed, or was this before -- while  
17 Mr. Hernandez was the Chair of the Board?

18 MS. HENRY: It would have had to have been when  
19 Mr. Hernandez was the Chair of the Board, because Mr. Thomas --

20 THE COURT: Okay. So then who was -- what was the  
21 composition of the Board at the time Mr. Thomas allegedly  
22 received this letter?

23 MS. HENRY: It would have been Mr. Livingston,  
24 Ms. Kirschbaum, Mr. LaSota, Mr. Hernandez, and Mr. Thomas. And  
25 to be clear, Your Honor, I'm saying that's the time that he saw



1 the letter. I don't have the letter, so I don't know who it  
2 was addressed to and the timing that it was sent. Only that he  
3 says it was from this administration, and it was shown to him  
4 as an object lesson.

5 THE COURT: So he received this letter at the time  
6 when the present Board was composed, the present Board we have  
7 now. And the letter complained about a decision that the  
8 clemency Board had made or was a threat of some sort?

9 MS. HENRY: Your Honor, to be clear, he did not  
10 receive the letter. The letter was addressed to a different  
11 Board member.

12 THE COURT: Does he know which Board member?

13 MS. HENRY: He's not shared that with me. I just met  
14 him for the first time on Sunday.

15 THE COURT: He hasn't shared that with you. Is he  
16 going to refuse to share that with you or me?

17 MS. HENRY: I don't think he can refuse you.

18 THE COURT: Well, I may not ask him, because this is  
19 not discovery.

20 MS. HENRY: Yes, ma'am.

21 THE COURT: So I'm not going to turn to him and ask  
22 him. If you think it's relevant, then you ask him. If he  
23 refuses to answer it's up to him.

24 MS. HENRY: I intend to ask the question. I was also  
25 hoping to get assurances that if he revealed the person who

1 showed it to him, that no adverse personnel action would be  
2 taken against that individual.

3 THE COURT: I'm not sure I can do that. I'm not sure  
4 I have the authority to do that. It seems to me that that's a  
5 separation of power, an executive decision as opposed to a  
6 judicial decision. But we'll deal with that.

7 Well, okay. That's something new that I didn't really  
8 see so far unless you're going to tell me I missed it.

9 MS. HENRY: It would be contained in the affidavit of  
10 Mr. Thomas which is attached to our complaint. I'm sorry.  
11 It's a declaration of Mr. Thomas that's attached to our  
12 complaint.

13 THE COURT: But, I mean, in terms of the timing of all  
14 of this.

15 MS. HENRY: I'm not sure how -- if it was perfectly  
16 clear.

17 THE COURT: I will -- I'm going to take that under  
18 advisement. But let me also remind plaintiffs' counsel that  
19 you all know so well, being very experienced in this area, is  
20 that I will not allow a fishing expedition on a TRO.

21 The issue that I have in front of me and you  
22 accurately cited what the law is in the Ninth Circuit to  
23 determine whether or not a temporary restraining order is to be  
24 granted, even in something as serious as a death penalty case,  
25 is you have to show a substantial likelihood of success. And

1 that has to be on the papers. And I certainly have seen that  
2 before in a case not too long ago where there were -- there was  
3 enough on the record to where I was concerned about there not  
4 being enough discovery.

5 But I will tell you right now that based upon what  
6 I've seen so far -- we haven't heard the testimony -- that it  
7 is unlikely that I would allow an expedition into the discovery  
8 that you're asking for which appears to me to be tentative at  
9 best at this point, although you've given me something to think  
10 about. Okay?

11 So it's under advisement. It's -- I'm not granting it  
12 just certainly for the purpose of this hearing. This is a  
13 temporary restraining order hearing based upon any evidence  
14 that you have to offer.

15 So -- And I will -- I will rule on that likely at the  
16 end of the hearing today.

17 Do you want to call your first witness?

18 MS. HENRY: Yes, ma'am. Plaintiff Schad calls Duane  
19 Belcher.

20 MS. GILLILAN-GIBSON: Your Honor, may I be heard on  
21 her first witness?

22 THE COURT: And why?

23 MS. GILLILAN-GIBSON: I want to object on the basis of  
24 relevancy. Mr. Belcher is a prior Board member. He does not  
25 have -- And his affidavit doesn't contain any information

1 regarding whether or not the current Board members can be fair  
2 and impartial. In the motion we had to quash, we cited you a  
3 case of Parker versus --

4 THE COURT: Let me stop you for a second. Generally  
5 the Rules of Evidence apply generally in every hearing before  
6 the Court. But the rules are, on a temporary restraining  
7 order, preliminary injunction, and sometimes an injunction, but  
8 primarily a temporary restraining order and preliminary  
9 injunction hearing the rules are relaxed, particularly with  
10 respect to something where there is a, without any doubt, there  
11 is the likelihood of irreparable harm. So I'm going to allow  
12 it. You can make the objections or you can cross-examine as  
13 you wish. I'm well aware of what your view is so far on the  
14 issue of relevancy.

15 DUANE BELCHER, PLAINTIFFS' WITNESS, SWORN

16 THE CLERK: Please say your name for the record and  
17 spell your last name.

18 THE WITNESS: Duane Belcher, B-e-l-c-h-e-r.

19 THE COURT: And you may proceed.

20 MS. HENRY: Thank you, Your Honor.

21 DIRECT EXAMINATION

22 BY MS. HENRY:

23 Q. Mr. Belcher, can you tell us how you are currently  
24 employed?

25 A. I'm retired.

1 Q. And what did you retire from?

2 A. State of Arizona Board of Executive Clemency.

3 Q. What was your position at the time of retirement with the  
4 Arizona Board of Executive Clemency?

5 A. Well, I had just been replaced as the Chairman/Executive  
6 Director, so actually at the time of my termination, I was in a  
7 training capacity for new Board members that were to come  
8 aboard.

9 Q. How long did you serve as a Board member of the Arizona  
10 Board of Executive Clemency?

11 A. Since 19 -- I was appointed by Governor Symington in 1992.

12 Q. And at the time you were appointed, it actually had a  
13 different name; is that correct?

14 A. Yes. It was the Arizona Board of Pardons and Paroles at  
15 that time.

16 Q. And then at some point when the legislation changed, was it  
17 with the Truth in Sentencing Act?

18 A. Yes. When Truth in Sentencing came aboard, the Board  
19 underwent a name change. The responsibilities basically  
20 remained the same pretty much, but the name was changed to the  
21 Arizona Board of Executive Clemency.

22 Q. And how many different governors did you serve under?

23 A. Two terms under Governor Symington, Governor Hull for a  
24 period of time, two terms under Governor Napolitano, and the  
25 remainder under Governor Brewer.



1 Q. Mr. Belcher, we're going to be brief today because it's  
2 late in the day, and this is a preliminary hearing, but just  
3 for purposes of the record and to sort of establish the next  
4 questions I want to ask you about, could you just briefly  
5 describe what the function of the Board was at the time that  
6 you served as a Board member and the Executive Director and  
7 Chairman.

8 A. Well, initially in '92 obviously the mechanism that we all  
9 know as parole was alive and well at that point in time. So a  
10 great deal of the Board's authorities and hearings were people  
11 that were in prison that were applying and eligible for parole  
12 status. And the Board made the decision basically whether or  
13 not they should be released from incarceration under parole.

14 Also, there were pardon responsibilities at the time  
15 and also executive clemency, which were basically the Board  
16 would conduct hearings, and the Board would make decisions  
17 whether or not to forward to the Governor the Board's  
18 recommendation that a person either receive a pardon if it was  
19 a pardon application or executive clemency. There were also  
20 death penalty cases that the Board heard. And basically the  
21 function was the same, that the Board would hear the case and  
22 make a decision whether or not a recommendation would be made  
23 to the Governor to either commute the sentence from the death  
24 penalty to, most of the time, to life in prison without the  
25 possibility of parole.

1 Q. And what is your understanding about the Board's role in a  
2 death penalty case in terms of the Governor's ability to grant  
3 a sentence commutation?

4 A. Well, the Board, in my estimation, has always been known as  
5 an independent hearing body. The Board is supposed to hear  
6 information, testimony, review documents or whatever, and make  
7 a decision based on the merits of the information that they  
8 have whether or not to forward a recommendation to the  
9 Governor. And so that's my understanding of what -- I hope I  
10 answered the question.

11 Q. Is the Board's recommendation binding on the Governor?

12 A. No. No. The Governor is under no obligation to go along  
13 with the Board's recommendation. However, if the Board fails  
14 to make a recommendation, then the Governor does not have the  
15 power to commute a sentence or act in any way on that  
16 particular case. It's only if the Board makes a positive  
17 recommendation to the Governor, then the Governor can act on  
18 the Board's recommendation.

19 Q. How many members are there on the Board?

20 A. There are, I believe, five now. When I started, there were  
21 seven, and through the years the number of Board members has  
22 been reduced.

23 Q. How long do the Board members serve a term?

24 A. They're five-year staggered terms. At least it was  
25 designed that way when I first came aboard that Board members

1 were appointed for five-year terms and that every year  
2 basically a term would expire and then a new Board member would  
3 be appointed, and that's the way that it would go.

4 Q. And I want to ask one more question, because, again, it's  
5 going to become relevant.

6 A. Okay.

7 Q. With respect to folks who have -- And I don't have the  
8 right terminology. I'm not an Arizona lawyer, as everybody  
9 here knows. At some point after Truth in Sentencing, the Board  
10 heard certain requests for early release if -- because of  
11 mandatory sentencing. Can you explain that process?

12 A. That was called a Disproportionality Review. Basically the  
13 legislature decided, when the criminal code changed from the  
14 old criminal code to the new one, that individuals -- they  
15 wanted to know whether or not there was some significant  
16 differences in the sentences that a person would receive prior  
17 to January 1, 1994, and that was the effective date. So if  
18 they committed a crime in December of '93 versus the same type  
19 of crime January of 1994, were there some significant  
20 differences in the penalties that were imposed?

21 And so they gave the Board the responsibility of  
22 basically putting together and conducting all the hearings  
23 necessary under that Disproportionality Review Act. And it was  
24 basically to say if the Board felt that the sentence was  
25 disproportionate, sort of out of whack with the other, and that

1 the Board felt a person would remain at liberty without  
2 violating the law if they were granted some type of clemency,  
3 then the Board could recommend those cases to the Governor.

4 Q. And that worked the same way as a death penalty  
5 recommendation, that they had to have a majority of the Board  
6 in order to get a positive recommendation?

7 A. Yeah. They would have had to have a majority of the Board  
8 to get a positive recommendation.

9 Q. So a two/two split is a negative recommendation?

10 A. Yes, because it's -- basically the status quo remains. If  
11 there's four Board members, and two say yes and two say no,  
12 it's not a majority of a quorum of the Board, and that is what  
13 the standard is.

14 Q. You've mentioned a number of governors who you served  
15 under. Excluding Governor Brewer, so before Governor Brewer  
16 took office, did any of the other governors or members of their  
17 staff ever contact you to let you know that they were  
18 displeased with the Board's vote in a certain matter?

19 A. To the best of my recollection, no.

20 Q. Prior to Governor Brewer --

21 A. I'm sure probably some of them were, but they never  
22 contacted me to express to me that they were dissatisfied with  
23 either my decision or --

24 THE COURT: When you say they probably were, what  
25 makes you say they probably were contacted?

1 THE WITNESS: No, I didn't mean contacted. I mean  
2 maybe dissatisfied with or not in agreement with the Board's  
3 recommendation.

4 THE COURT: I see. So that there may have been some  
5 disagreement, but it was never communicated?

6 THE WITNESS: Right. That's correct.

7 THE COURT: Thank you.

8 Q. (BY MS. HENRY) Prior to Governor Brewer's administration,  
9 did any member of any other gubernatorial staff ever call you  
10 in for a meeting to discuss the vote in any particular case?

11 A. No. Well, if I can clarify that, there have been times  
12 where individual staff members from other administrations have  
13 asked or called me to clarify some information, because in  
14 serving as the chairman, a lot of the responsibilities that  
15 were not basically placed on the Board members were in fact  
16 placed on the Chairman. So if it was a matter of victim  
17 notification or some other, you know, technical things, then in  
18 fact they might ask me was this done or was that done or  
19 whatever but not to basically discuss the vote.

20 Q. Your term expired during Governor Brewer's administration;  
21 is that correct?

22 A. That's correct.

23 Q. Prior to your term expiring -- and, again, I'm going to try  
24 and facilitate things to move us along -- did you have an  
25 occasion to hear the clemency case on behalf of a gentleman



1 named William Macumber?

2 A. Yes, I did.

3 Q. And did you -- do you recall what the Board's vote was in  
4 that case?

5 A. I believe the first Bill Macumber clemency hearing, I  
6 believe it was a unanimous vote of -- and I'm thinking five  
7 members at the time. I could be a little off because I don't  
8 have all of the records in front of me. But I believe it was  
9 in fact a unanimous vote to recommend clemency in the first  
10 Bill Macumber hearing.

11 MS. HENRY: Your Honor, I apologize for not having  
12 these exhibits pre-marked, but I was wondering if I could mark  
13 an exhibit.

14 THE COURT: Sure.

15 MS. HENRY? May I approach the witness, Your Honor?

16 THE COURT: Yes. Why don't you hand it to Christine.  
17 She does well at that.

18 LAW CLERK: This Christine.

19 THE COURT: Yeah, two Christines.

20 Q. (BY MS. HENRY) Mr. Belcher, in front of you is a  
21 collective exhibit Plaintiffs' No. 1. Do you recognize that  
22 exhibit?

23 A. Yes, I do.

24 Q. And if you could, tell the Court what that exhibit is.

25 A. And that is the -- Wait a minute. That's the first exhibit

1 in the packet. That was a letter that was written by myself on  
2 behalf of the Board, and this letter basically was notifying  
3 Mr. Macumber that his application for clemency had been denied  
4 by the Governor and also was advising him that if eligible he  
5 could reapply for commutation two years from May of '09. And  
6 that's when the Board basically made the -- had the hearing and  
7 made the recommendation.

8 Q. And attached to that letter is there also another letter  
9 dated August 25th, 2009?

10 A. Yes, there is.

11 Q. And can you tell the Court what that letter is?

12 A. That is the letter that the Board submits in every  
13 recommendation for clemency to the Governor basically  
14 outlining, explaining the reasons why the Board felt that  
15 executive clemency would in fact be in order.

16 Q. And in 2009, the Board unanimously recommended clemency on  
17 behalf of Mr. Macumber; is that correct?

18 A. That's correct.

19 Q. And obviously the Governor chose not to go along with that  
20 recommendation. Were you contacted by anyone in the Governor's  
21 administration regarding the Board's vote -- Well, before I ask  
22 you that, did Mr. Macumber come before the Board again?

23 A. Yes, he did.

24 Q. A second time in 2011?

25 A. I believe that was -- I'm not real sure about the date, but

1 I'm -- that's probably correct.

2 Q. And at the time, the original five Board members -- the  
3 composition of the Board at that point was different; is that  
4 also correct?

5 A. That's correct.

6 Q. And the only folks who were on the Board at that time who  
7 had sat in 2009 were yourself and Ms. Stenson; is that correct?

8 A. That's correct.

9 Q. And I'm asking some leading questions just to move along,  
10 Judge.

11 And at the time in -- that Mr. Macumber came back,  
12 Ms. Stenson was unable to be present for the hearing. Is that  
13 your memory?

14 A. That is correct.

15 Q. And what was the result of that second hearing?

16 A. I believe it was two to two. There were two Board members  
17 that were voting favorably to recommend clemency to the  
18 Governor and two Board members disagreed, so two/two split. Of  
19 course there was no recommendation that was made.

20 Q. And so at that time it was you and Mr. LaSota who voted in  
21 favor of Mr. Macumber?

22 A. To the best of my recollection, that's correct.

23 Q. And Ms. Wilkens and Ms. Kirschbaum who voted against  
24 Mr. Macumber?

25 A. That's also correct.

1 Q. There was another individual who came before the Board that  
2 I want to ask you about, a gentleman by the name of  
3 Mr. Flibotte, and that's F-l-i-b-o-t-t-e. You don't have an  
4 exhibit in front of you with his name. Do you recall the  
5 Flibotte case?

6 A. I do.

7 Q. Can you describe briefly what the Flibotte case involved?

8 A. Mr. Flibotte was an older gentleman. I don't know. He was  
9 not from Phoenix or Tucson but I think in one of the other  
10 counties. And he was convicted of possessing child  
11 pornography. And as I recall, the judge in the case issued a  
12 603L order, which basically is the Court's ability, if they  
13 have to sentence somebody to a specific amount of time in  
14 prison and they think that's excessive, the Court can issue a  
15 603L order basically saying: You can apply for executive  
16 clemency. We as the Court felt that the sentence we imposed is  
17 too much.

18 Q. And Mr. Flibotte was a 603L case?

19 A. To the best of my recollection, that's correct.

20 Q. And my courtroom skills are rusty, so I'm going to ask you  
21 about that in a minute, but, Your Honor, I would move admission  
22 of Plaintiffs' Exhibit No. 1.

23 MS. GILLILAN-GIBSON: No objection.

24 THE COURT: It's admitted.

25 MS. HENRY: Thank you, Your Honor, and I apologize for

1 not doing that at the same time.

2 THE COURT: Thank you.

3 Q. (BY MS. HENRY) Turning back to the Flibotte case, do you  
4 recall what the Board's recommendation in Mr. Flibotte's case  
5 was?

6 A. Again, to the best of my recollection, I believe it was  
7 time served. He had obviously been in prison for a period of  
8 time, and I think that the Board recommended to the Governor  
9 that his sentence be commuted to time served.

10 Q. And do you recall if that vote was unanimous or if there  
11 was dissent?

12 A. That I don't.

13 Q. And Mr. Flibotte's case came before the Board near the end  
14 of your term of service as it turned out; is that correct?

15 A. That's correct.

16 Q. Do you know who Scott Smith is?

17 A. Yes.

18 Q. Who is Scott Smith?

19 A. I believe he's the Governor's Chief of Staff at this time.

20 Q. At the time that you knew Scott Smith, did you -- what was  
21 his position?

22 A. I believe part of the time that he was Deputy Chief of  
23 Staff.

24 Q. At any point during your term of service did you have any  
25 interaction with Mr. Smith regarding the Board's votes on any



1 particular cases?

2 A. Yes, ma'am.

3 Q. Could you please share with the Court that experience.

4 A. I believe it was a couple of times, but it was regarding  
5 those two cases, the Macumber case, as you've mentioned here,  
6 and the Flibotte case. And I remember being called to the  
7 Governor's --

8 THE COURT: Let me ask you for foundation. When did  
9 that occur? When did those occur? Can you estimate, or do you  
10 remember?

11 THE WITNESS: Unless it's in my affidavit, I don't.

12 THE COURT: And if you proffer what's in the affidavit  
13 to remind me, just go ahead, and I'm sure counsel will agree.  
14 When was that?

15 MS. HENRY: Early 2012.

16 THE COURT: Thank you.

17 THE WITNESS: All right. So it was specific to those  
18 cases, the Macumber case. I had a discussion with Mr. Scott  
19 Smith and Mr. Joe Sciarrotta, who is the General Counsel to the  
20 Governor regarding -- I believe the first time it was regarding  
21 the Macumber case.

22 And I was asked a number of questions as to why I  
23 voted and why did I feel the Board voted to recommend to the  
24 Governor executive clemency in the case. And I was asked some  
25 specific questions as to did the Board notify the victims in

1 the particular case. One I recall. And I did everything in my  
2 power as Chairman to obviously find victims -- that was my  
3 responsibility -- and notify them.

4 And I in fact had spoke to the only victim that I  
5 could find in the Macumber case. And I recall also being asked  
6 did I notify Carol Macumber, the victim in the particular case.  
7 And so my question was Carol Macumber was not a victim by  
8 statute in that particular case. She was the wife of Bill  
9 Macumber, and she basically was the one, I think, that came  
10 forward and said my husband had admitted to me that he  
11 committed these crimes.

12 So I clarified that to them because, again, she was  
13 not a legal victim. And we tried to do everything we could to  
14 notify everybody that had an interest in the particular case.

15 And then I was basically asked, well, you didn't  
16 believe her when she --

17 MS. GILLILAN-GIBSON: Objection, Your Honor. Hearsay.

18 MS. HENRY: Your Honor, it's not being offered for the  
19 truth of the matter asserted but more to explain --

20 THE COURT: In fact, who was this that made this  
21 statement to you? You were about to tell me something. Who  
22 was it?

23 THE WITNESS: Scott Smith and Joe Sciarrotta, who was  
24 the General Counsel.

25 THE COURT: And I thought Mr. Smith was a defendant in

1 this case.

2 MS. HENRY: He is.

3 THE COURT: All right. So then why isn't that an  
4 admission?

5 MS. GILLILAN-GIBSON: Your Honor, Joe Sciarrotta is  
6 not an admission, and Mr. Belcher did not specify who said.

7 THE COURT: And there is no agency connection that you  
8 can establish?

9 MS. HENRY: Let me ask a few more questions, Your  
10 Honor.

11 THE COURT: Because otherwise when you say it's  
12 offered for the truth or not truth, is it your position it's  
13 not hearsay, or is there an exception to the hearsay rule in  
14 that it's not being offered for the truth, number one, or that  
15 it's as she happens to be an agency for the Governor, and if  
16 so, you have to establish the foundation for it? Which is it?

17 MS. HENRY: Let me establish the foundation for it,  
18 Your Honor.

19 Q. (BY MS. HENRY) Let me back up a couple steps. And I'm  
20 sorry I'm trying to go too quickly.

21 Scott Smith at the time was the Deputy Chief of Staff  
22 for the Governor?

23 A. I believe so.

24 Q. And was he your liaison to Governor Brewer?

25 A. No. Joe Sciarrotta was my liaison to Governor Brewer.

1 Really the Deputy General Counsel was actually my liaison.

2 Q. Let me ask you who is Joe Sciarrotta?

3 A. Joe Sciarrotta was the General Counsel to the Governor.

4 Q. So the General Counsel for the Governor and the Chief  
5 Deputy Counsel for the Governor had a meeting with you about  
6 Bill Macumber? Let's just focus on that right now.

7 A. That's correct.

8 Q. And was it Scott Smith or Joe Sciarrotta who asked the  
9 question about why Carol Macumber was not contacted?

10 A. I believe it was, to the best of my recollection, I believe  
11 it was Mr. Sciarrotta.

12 Q. And Mr. Sciarrotta's question to you was what?

13 A. Was the victim notified in a particular case. And it was  
14 specifically mentioned Carol Macumber. And then that's when I  
15 responded that Carol Macumber was not a victim in the Bill  
16 Macumber case and that I had in fact notified the victim or  
17 made every effort to notify the true victim by statute that I  
18 could.

19 Q. And a lot of people in this courtroom are very familiar  
20 with the Bill Macumber case, but those who look at the record  
21 on down the road may not be. Mr. Macumber was accused of what?

22 A. Of a double homicide. And I forget when it took place. It  
23 was quite a few years ago. There were two young individuals  
24 that were killed in the desert.

25 MS. GILLILAN-GIBSON: Your Honor, I'm going to object.

1 Again, we have limited time for this TRO. The issue's bias  
2 about the current Board, so I don't know what the specific  
3 facts about Macumber --

4 THE COURT: I'm going to sustain the objection.

5 Q. (BY MS. HENRY) In any event, Carol Macumber was not the  
6 victim of that crime; she wasn't murdered, and she wasn't a  
7 family member?

8 A. That's correct.

9 Q. That's all I was getting at, Your Honor.

10 And you were asked that question. Do you recall being  
11 asked a question by any member of the Governor's staff  
12 regarding the Flibotte vote?

13 A. Yes.

14 Q. Which member of the Governor's staff asked you questions  
15 about Flibotte?

16 A. To the best of my recollection, both Mr. Scott Smith and  
17 Joe Sciarrotta. Who asked what specific question, I can't  
18 remember.

19 Q. The two of them were together in a meeting with you?

20 A. That's correct.

21 Q. Was there anyone else present in the meeting?

22 A. No.

23 Q. Where did the meeting take place?

24 A. I believe it was the -- I don't know -- the eighth or ninth  
25 floor conference room in the Governor's Tower.



1 Q. So you -- It was at the Governor's Office?

2 A. Yes.

3 Q. And what was asked of you about or said to you about the  
4 Flibotte vote?

5 A. Well, specifically one question was asked was why did the  
6 Board recommend time served in the Flibotte case and not what  
7 the Court had basically suggested might be appropriate -- an  
8 appropriate sentence.

9 Q. Did you -- What was the tone of the questioning in the  
10 conversation?

11 A. My impression of the tone was it was -- they were not  
12 satisfied with what the Board's recommendation was to them.

13 Q. What about their demeanor caused you to come to that  
14 conclusion?

15 A. Well, the questions that were asked and sometimes the body  
16 language, the raising of voices, the leaning up in chairs, body  
17 language, is the best I can --

18 Q. Do you recall who raised their voice?

19 A. I believe Scott Smith was one of them that did.

20 Q. And you motioned leaning forward in the chair in sort of  
21 a -- in what kind of manner?

22 A. My opinion was in an aggressive manner.

23 Q. Did you communicate the content -- In early 2012, who were  
24 the members of the Arizona Board of Executive Clemency besides  
25 yourself?

1 A. I believe that was myself, Ms. Ellen Stenson, Ms. Marilyn  
2 Wilkens, Ellen Kirschbaum, and Mr. Jack LaSota.

3 Q. So two current members were on the Board at the time?

4 A. Yes, Mr. LaSota and Ms. Kirschbaum.

5 Q. Did you communicate what had been said to you by  
6 Mr. Sciarrotta and Mr. Smith to the members of the Board of  
7 Executive Clemency?

8 A. I probably did, but I can't remember specifically having  
9 any type of meeting or whatever, but I imagine that I did.

10 Q. Do you recall Mr. Smith telling you that the Governor felt  
11 blindsided by the vote in the Macumber case?

12 A. Yes.

13 Q. In this matter, Mr. Belcher, were you asked to provide an  
14 affidavit on behalf of plaintiff Mr. Schad?

15 A. Yes, I was.

16 Q. And did you review a declaration for errors and accuracy?

17 A. Yes, I did.

18 Q. And that document has been filed with this Court as  
19 document 1-5, and it's dated September the 26th of 2013; is  
20 that correct?

21 A. I believe so.

22 Q. And you signed that document in Tucson, Arizona; is that  
23 correct?

24 A. That's correct.

25 Q. At the Office of the Federal Public Defender down there?

1 A. That's also correct.

2 Q. The contents of this declaration, are they true and  
3 accurate to the best of your knowledge and belief?

4 A. Yes, they are.

5 Q. And you reviewed it carefully before you signed it?

6 A. Yes, I did.

7 MS. HENRY: If I could have just one moment, Your  
8 Honor?

9 Mr. Belcher, I have no further questions for you, but  
10 defense counsel may have some.

11 THE WITNESS: Thank you.

12 THE COURT: Counsel.

13 CROSS-EXAMINATION

14 BY MS. GILLILAN-GIBSON:

15 Q. Good afternoon, Mr. Belcher. How are you doing?

16 A. Good afternoon. How are you?

17 Q. So, Mr. Belcher, when you were on the Board, did you always  
18 vote independently?

19 A. Yes, ma'am.

20 Q. Did you ever vote according -- based on outside influence?

21 A. Well, outside influence, yes, I did.

22 Q. Okay. Did anyone pressure you to vote a particular way?

23 A. No, ma'am.

24 Q. So you always voted based on the information you received  
25 at the hearing; is that correct?

1 A. That's correct.

2 Q. So after this meeting that you had with Mr. Sciarrotta and  
3 Mr. Smith, did you come back to the Board and try to influence  
4 the current Board members' vote?

5 A. No.

6 Q. Did you tell Ms. Kirschbaum and Mr. LaSota that they would  
7 have to vote a certain way?

8 A. No.

9 MS. GILLILAN-GIBSON: I have no further questions,  
10 Your Honor.

11 THE COURT: Thank you. Redirect.

12 REDIRECT EXAMINATION

13 BY MS. HENRY:

14 Q. You know defendant -- or you know Mel Thomas; is that  
15 correct?

16 A. Yes, I do.

17 Q. And you spent some time --

18 MS. GILLILAN-GIBSON: Objection, Your Honor. Goes  
19 beyond the scope of cross-examination.

20 MS. HENRY: I'm laying foundation to ask a question  
21 that actually is responsive to cross-examination.

22 THE COURT: Okay. We'll see. Go ahead.

23 MS. HENRY: Your Honor, may I just ask a leading  
24 question?

25 THE COURT: Go ahead.

1 Q. (BY MS. HENRY) Did you tell Mr. Thomas that you believed  
2 that the reason that you were not reappointed as Chairman of  
3 the Board and as a Board member is because of your vote on  
4 certain cases such as Mr. Flibotte's case and Mr. Macumber's  
5 case?

6 A. I believe I did.

7 MS. HENRY: Thank you, Your Honor. No further  
8 questions.

9 THE COURT: All right. You may step down.

10 MS. HENRY: Your Honor, plaintiff Schad calls Melvin  
11 Thomas.

12 Your Honor, may Mr. Belcher be excused?

13 MS. GILLILAN-GIBSON: Yes, he may, Your Honor.

14 THE COURT: Thank you.

15 MELVIN THOMAS, PLAINTIFFS' WITNESS, SWORN

16 THE CLERK: State your name for the record, and spell  
17 your last name please.

18 THE WITNESS: Melvin Thomas, T-h-o-m-a-s.

19 DIRECT EXAMINATION

20 BY MS. HENRY:

21 Q. Mr. Thomas, how are you currently employed?

22 A. Am I currently employed?

23 Q. Are you currently employed?

24 A. No, ma'am.

25 Q. Where were you last employed?



1 A. Where was I last employed?

2 Q. Yes, sir.

3 A. With the Arizona Board of Executive Clemency.

4 Q. And how long did you serve with the Arizona Board of  
5 Executive Clemency?

6 A. Approximately a year and three or four months.

7 Q. Were you appointed in April of 2012 and served until August  
8 of 2013? Does that sound about right?

9 A. Yes, that's correct.

10 Q. And at the time that you came to the Board, were you aware  
11 that, as you said in your declaration, three Board members who  
12 had left before you had been forced out?

13 A. I became aware of some comments after I got on the Board.  
14 I wasn't aware of anything prior to because I didn't speak to  
15 anyone on the Board prior to meeting with Duane on my first --  
16 Mr. Belcher on my first day.

17 Q. So you came to know that once you started working at the  
18 Board?

19 A. There were comments that were made about why people were  
20 gone.

21 Q. And, Mr. Thomas, you provided a declaration for an attorney  
22 with the local Federal Public Defender's Office, Ms. Laura  
23 Berg; is that correct?

24 A. Yes, ma'am.

25 Q. And you read the declaration?

1 A. Yes, ma'am.

2 Q. And looked at it very carefully?

3 A. I had her change some things that weren't quite accurate.  
4 And to be perfectly honest with you, I missed one, because I  
5 have to look at it. Do you mind? I have to pull it up on my  
6 phone.

7 THE COURT: She has it. She'll provide it to you.

8 MS. HENRY: Your Honor, may I provide the witness with  
9 document 1-8?

10 THE COURT: Please give it to Christine.

11 MS. HENRY: I'm sorry.

12 Q. (BY MS. HENRY) In front of you, Mr. Thomas, is document  
13 1-8 titled Declaration of Melvin Thomas. Do you see that  
14 there?

15 A. Yes, ma'am.

16 Q. And do you see on the second page your signature?

17 A. Yes, ma'am.

18 Q. And it's dated the 16th day of September, 2013; is that  
19 correct?

20 A. Yes, ma'am.

21 Q. And I'll direct your attention to Paragraph 3. Do you see  
22 where I'm talking about there?

23 A. Yes, ma'am.

24 Q. And do you see in the third sentence "I was aware that the  
25 three Board members who left before me were forced out because

1 each one of them had recommended clemency in one or more cases  
2 that got sent up to Governor Brewer"?

3 A. That was some information that was implied, yes.

4 Q. And that's what you wrote in your declaration?

5 A. Yes, ma'am.

6 Q. And you received that information from Duane Belcher?

7 A. No, not directly from Mr. Belcher.

8 Q. Who did you receive that information from?

9 A. Various folks that apparently thought that they knew more  
10 about what was going on than I did.

11 Q. Mr. Thomas, did you tell us in your declaration and did you  
12 tell me on Sunday that at least one Board member who had voted  
13 for clemency received a letter from the Governor's Office  
14 informing him or her that the Governor was displeased with his  
15 or her vote?

16 A. I further clarified that for you too that it was on a phone  
17 where the person had a, just like that --

18 Q. Mr. Thomas, I'm want to ask you all about the letter, but  
19 my question to you right now --

20 A. Well, the way you asked me the question disturbs me because  
21 that's not quite accurate. But go ahead.

22 Q. Mr. Thomas, right now let me just ask you is the  
23 declaration that you signed, does it say in Paragraph 3 at  
24 least one Board member who had voted for clemency received a  
25 letter from the Governor's Office informing him or her that the

1 Governor was displeased with his or her vote? Is that what it  
2 says there?

3 A. Yes, ma'am.

4 Q. Now, the letter that you observed -- Did you observe a  
5 letter? Is that true?

6 A. It was a -- supposedly a letter, but I didn't see the whole  
7 letter because it was on their phone as an e-mail.

8 Q. So you saw a letter on someone's phone?

9 A. Yes. And they showed me just portions of that. I don't  
10 know who signed it or who it was addressed to. That was what  
11 my clarification was with you on Sunday.

12 Q. And I believe what you said was that the letter was dingy;  
13 is that correct?

14 A. Yes, ma'am.

15 Q. I didn't understand it to have been on a phone, so that was  
16 my confusion. I apologize.

17 A. Say that again please.

18 Q. I didn't understand you were saying it was on someone's  
19 phone. So on someone's phone you saw a dingy letter?

20 A. Well, that's why I showed you the phone, because it was not  
21 some little small phone. It was the -- what do you call  
22 these? -- notebook, notepads, notebooks. Okay.

23 Q. The person who showed you the letter was not a Board  
24 member; is that correct?

25 A. No, ma'am.

1 Q. That's not correct?

2 A. The person who showed it to me was not a Board member, no.

3 Q. And you've been unwilling to share with us the name of the  
4 individual who showed you the letter?

5 A. And I shared with you -- Yes, I am, and that was because I  
6 had to check with that person to find out if it was okay if I  
7 would divulge that information to anyone else, because they  
8 gave it to me in confidence.

9 Q. Are you willing to answer the question today for the Judge?

10 A. In private.

11 Q. Why is it you don't want to give the name?

12 A. Because the person showed it to me to give me some  
13 information about what they believe had been going on, but I  
14 don't know who the letter was addressed to. It could have been  
15 to anyone. Okay. Just showed me a section of the letter on  
16 their phone.

17 MS. GILLILAN-GIBSON: Your Honor, I don't mean to  
18 interrupt. I guess I'm just seeking a clarification, because  
19 the declaration says it was at least one Board member who had  
20 received this letter, and now, based on the questioning, it  
21 wasn't a Board member who received a letter.

22 MS. HENRY: That's what I'm trying to establish.

23 THE COURT: Well, what I understand so far -- and  
24 correct me if I'm wrong -- is that someone showed you on a  
25 notebook, if that's what it's called, a letter that one of the



1 Board members had received.

2 THE WITNESS: Allegedly received, yes.

3 THE COURT: A letter that that Board member had  
4 received showing or indicating that the Governor was unhappy  
5 with that Board member's decision?

6 THE WITNESS: Not just that Board member but several  
7 Board members' decisions on a particular case, but I don't  
8 remember the case.

9 THE COURT: So the letter read that? Is that what the  
10 letter stated, or is that what the person said?

11 THE WITNESS: That's what they said. It implied that  
12 they were upset with their votes on a particular case. I don't  
13 know which case that was either.

14 THE COURT: With all the Board members' decisions?

15 THE WITNESS: No.

16 THE COURT: I'm very confused about --

17 THE WITNESS: Not with all the Board members'  
18 decisions. There was a particular case, and they were upset  
19 with how the Board had voted.

20 THE COURT: Okay. So they -- Let's try not to --

21 THE WITNESS: And I don't know if it was -- Because I  
22 didn't see a signature block or who it was addressed to.

23 THE COURT: All right. Thank you. Let's both you and  
24 I try not to use pronouns.

25 This person who you have not identified showed you

1 what he or she thought was a letter that the Board members  
2 received from the Governor or an agent of the Governor that  
3 indicated or implied that the Governor was displeased with the  
4 Board members' decision on a particular case?

5 THE WITNESS: Yes, ma'am.

6 THE COURT: And you haven't identified who that person  
7 is. Did you read the letter?

8 THE WITNESS: All I saw was like on here. They just  
9 pulled up a section of the letter.

10 THE COURT: Okay. Could you tell from the section  
11 that it was actually addressed to all the Board members?

12 THE WITNESS: No.

13 THE COURT: Could you tell that it was a letter from  
14 the Governor or an agent of the Governor?

15 THE WITNESS: No.

16 THE COURT: So then how did you come to conclude that  
17 it came from the -- that it was a letter and that it came from  
18 the Governor or an agent of the Governor?

19 THE WITNESS: That was implied by the person who  
20 showed it to me.

21 THE COURT: That was implied or specifically said?

22 THE WITNESS: Implied.

23 THE COURT: Go ahead.

24 Q. (BY MS. HENRY) Why -- What was the purpose of showing you  
25 the letter?

1 A. I think, to be honest with you, I really don't know. I  
2 think they thought that I would be intimidated by it.

3 Q. And you have chosen not to reveal the name of the  
4 individual because you feel like the person wasn't supposed to  
5 show you the letter?

6 A. I don't think they were.

7 Q. I'm sorry?

8 A. I don't believe they were or they had no reason to show it  
9 to me, to be perfectly honest with you.

10 Q. Do you fear adverse personnel action will come to that  
11 individual for having shown you the letter?

12 A. No. Why?

13 THE COURT: I'm sorry. Your answer?

14 THE WITNESS: No. I don't think any adverse personnel  
15 action.

16 Q. (BY MS. HENRY) Could they get in trouble?

17 A. I don't know if they could get in trouble, but I would have  
18 to ask that person, because they showed it to me in confidence,  
19 and I said: Okay, cool. I'm not going to share that with  
20 anyone else.

21 THE COURT: Can you -- Let me interrupt for a second.

22 THE WITNESS: Yes, ma'am.

23 THE COURT: Did you read it, what they showed you?

24 THE WITNESS: Just the first couple sentences, and  
25 then I decided that -- you know what? -- I don't care what that

1 implies; I'm going to do what I do.

2 THE COURT: When you said just a couple of sentences,  
3 could you identify it as actually a letter or the person said  
4 it was a letter?

5 THE WITNESS: They said it was a letter.

6 THE COURT: So you saw a couple of sentences. What do  
7 you recall those sentences stated?

8 THE WITNESS: Referring to comments and a particular  
9 vote of the Board may have jeopardized the positions of the  
10 three Board members that were being replaced.

11 THE COURT: It said they may have jeopardized?

12 THE WITNESS: Their ability to be objective. I don't  
13 know what that really meant.

14 THE COURT: I'm not quite sure what you're saying.  
15 Can you more than paraphrase it? What was said?

16 THE WITNESS: Well, Judge, to be honest with you, I  
17 really wasn't paying a whole lot of attention. I think the  
18 person was just trying to goad me into thinking that I would  
19 succumb to that kind of pressure. And I just made a comment to  
20 them at the time.

21 THE COURT: So was it more of what the person said  
22 than what you read?

23 THE WITNESS: Yes, ma'am.

24 THE COURT: Okay. And you can't recall exactly what  
25 was set forth in this purported letter?

1 THE WITNESS: No, ma'am.

2 THE COURT: Okay. Go ahead.

3 Q. (BY MS. HENRY) Moving on from the subject of the letter, I  
4 want to ask you, Mr. Thomas, because you and I have seen each  
5 other in a professional setting but actually never had a  
6 discussion about this matter or your declaration until  
7 Sunday --

8 A. That's correct.

9 Q. -- of this week, whatever today is?

10 And when we met, it was very important to you that I  
11 let the Judge know -- and I told you that I would -- that you  
12 did not take part in any conversation about the Schad case with  
13 Ms. Kirschbaum or Mr. Livingston; is that correct?

14 A. That's absolutely correct.

15 Q. That's your testimony?

16 A. Yes, ma'am.

17 Q. And if Mr. Kirschbaum or if Ms. Kirschbaum and  
18 Mr. Livingston had a conversation not in your presence, you  
19 wouldn't know about it?

20 A. If I wasn't present, I wouldn't know anything about it.

21 Q. Did you and other Board members have a break room?

22 A. Yes, ma'am.

23 Q. Did you go to the break room?

24 A. Yes, ma'am.

25 Q. Did you go to lunch together sometimes?

1 A. Occasionally, after January -- I'm sorry. After we moved  
2 back into the building, because we were holding hearings during  
3 the renovations at 1601 South 16th Street, I believe.

4 Q. Thank you. Do you still have your declaration in front of  
5 you?

6 A. Yes, ma'am.

7 Q. Let me direct you to Paragraph 4. In that declaration in  
8 Paragraph 4 did you also tell the attorney with the Federal  
9 Public Defender's Office that "The other members of the Board,  
10 while I served, were also aware that their predecessors had  
11 lost their jobs because of how they voted"? Did you say that?

12 A. I believe everybody knew that or at least suspected that  
13 folks had been replaced because of some particular vote or  
14 votes that they had made in the past.

15 Q. And did you also swear under penalty of perjury that I knew  
16 that it was possible that I too could lose my job as a result  
17 of how I voted, but it did not affect my vote?

18 A. It was implied, but I'm one -- Well, I'm one of those  
19 individuals that says you're not going to intimidate me. I'm  
20 sorry.

21 Q. So it was implied, you weren't intimidated, but you did  
22 state that you knew it was possible that you could lose your  
23 job?

24 A. You could lose your job for any given reason, yes.

25 Q. Mr. Thomas, I'm not trying to argue with you.



1 A. I understand, but yes.

2 Q. You said that in your declaration?

3 A. Yes, ma'am.

4 Q. And you signed it?

5 A. Yes, I did.

6 Q. And in Paragraph 5 did you share with us in your  
7 declaration that "On more than one occasion Chairman Hernandez  
8 informed the Board members that Governor Brewer had been  
9 unhappy with one of our recent --" and there's a typographical  
10 error there -- "our recent our decisions or that she would be  
11 unhappy if we voted a certain way in an upcoming case"? Did  
12 you sign that?

13 A. Yes, I did.

14 Q. And did you also tell us that Mr. Hernandez indicated he  
15 was getting his information from the Governor's Office?

16 A. Yes, ma'am.

17 Q. And you've also been very clear that you didn't let that  
18 affect your vote?

19 A. To be perfectly honest with you, half the stuff that came  
20 off his lips I didn't believe in the first place.

21 Q. So, Mr. Thomas, did Mr. Hernandez say those things?

22 A. Yes, ma'am.

23 Q. All right. Mr. Thomas, you resigned your position from the  
24 Board in early August, August 6, 2013; is that correct?

25 A. Was that the first Monday?

1 Q. The first Monday in August you resigned?

2 A. Yes, ma'am.

3 Q. And you resigned in an effort to accelerate the Department  
4 of Administration's investigation into a matter that you and  
5 your fellow Board members had filed against Mr. Hernandez; is  
6 that correct?

7 A. Which one are you referring to?

8 Q. You -- Let me ask you this. Have you and your fellow Board  
9 members filed a complaint with the Department of Administration  
10 alleging that Mr. Hernandez has cheated you out of money?

11 A. Yes.

12 Q. And you were frustrated with the pace of that  
13 investigation; is that correct?

14 A. No. It was a totality of the -- There was a prior one as  
15 well. It's kind of hard to explain because it has nothing to  
16 do with this case. But if you don't mind, I will.

17 Q. If it's not relevant it's not relevant.

18 A. Okay.

19 MS. HENRY: One moment, Your Honor.

20 THE COURT: Sure.

21 MS. HENRY: That's all I have, Your Honor.

22 THE COURT: All right. Cross.

23 CROSS-EXAMINATION

24 BY MS. GILLILAN-GIBSON:

25 Q. Good afternoon, Mr. Thomas.

1 A. Good afternoon, Ms. Gibson.

2 Q. Did you take your job seriously as a Board member?

3 A. Absolutely.

4 Q. Did anyone ever specifically tell you how to vote?

5 A. No.

6 Q. Did you let anyone tell you how to vote?

7 A. No.

8 Q. While you were a Board member, did you witness anybody tell  
9 any of your other co-Board members how to vote?

10 A. No.

11 Q. You had already testified that you never participated in a  
12 conversation with Ms. Kirschbaum and Mr. Livingston regarding  
13 the Schad matter; is that correct?

14 A. No, ma'am, because when I left, Schad wasn't even up for  
15 anything. Now, there was no reason to have a discussion about  
16 any inmate coming up for clemency, particularly during our  
17 lunch hour. And to be perfectly honest with you, during our  
18 lunch hours, our breaks, we rarely talked about work. We  
19 talked about basketball, football, various wines.

20 Q. Okay. And so as a Board member, if you would have  
21 witnessed two people predetermining a case, what action would  
22 you have taken?

23 A. I would have had to contact, prior to you, it was Mary Jane  
24 Gregory.

25 Q. So had you witnessed two Board members violating -- or more

1 than two Board members violating the Open Meeting law, you  
2 would have reported it?

3 A. That's the way I was trained by Ms. Gregory when she had me  
4 sit in her office for about eight hours going over the various  
5 statutes. And then there was a subsequent briefing about the  
6 various statutes and particularly the Open Meeting statute.

7 Q. Okay. And during the time you were on the Board with  
8 Ms. Kirschbaum, Mr. LaSota, and Mr. Livingston, were there  
9 times that you actually voted for commutation?

10 A. Yes, ma'am.

11 Q. So the vote wasn't no every single time, right?

12 A. No, ma'am.

13 MS. GILLILAN-GIBSON: Okay. I have no further  
14 questions.

15 THE COURT: All right. Redirect?

16 MS. HENRY: No, Your Honor.

17 THE COURT: You may step down.

18 MS. HENRY: Plaintiff Schad calls Ellen Stenson.

19 THE COURT: Thank you.

20 ELLEN STENSON, PLAINTIFFS' WITNESS, SWORN

21 THE CLERK: State your name for the record, and spell  
22 your last name please.

23 THE WITNESS: Ellen Stenson, S-t-e-n-s-o-n.

24 THE COURT: Go ahead.

25 MS. HENRY: Your Honor, may I provide Ms. Stenson her

1 declaration?

2 THE COURT: Yes.

3 DIRECT EXAMINATION

4 BY MS. HENRY:

5 Q. Ms. Stenson, how are you currently employed?

6 A. With the Clerk of Court in Maricopa County.

7 Q. And in what capacity?

8 A. Courtroom clerk.

9 Q. At some point in your career have you been employed as a  
10 member of the Arizona Board of Executive Clemency?

11 A. Yes.

12 Q. When were you first appointed to the Board?

13 A. I was appointed, I believe, February of 2007 and then  
14 confirmed by the Senate in May of 2007.

15 Q. How long did you serve with the Board?

16 A. Five years.

17 Q. How long is a term with the Board?

18 A. Five years.

19 Q. Had you applied for reappointment?

20 A. Yes.

21 Q. During the time that you served as a member of the Arizona  
22 Board of Executive Clemency, did you have occasion to consider  
23 the case of Bill Macumber?

24 A. Yes.

25 Q. And when you were -- His case came before the Board, we've

1 heard testimony already today, twice, in 2009 and again in  
2 2011; is that correct?

3 A. I think it came up in 2012 the second time.

4 Q. Thank you for correcting me.

5 And when Mr. Macumber's case came up in 2009, were you  
6 among the Board members who heard the case?

7 A. Yes.

8 Q. And what was your vote at that time?

9 A. To recommend -- recommend to the Governor clemency.

10 (Video teleconference interruption.)

11 MS. SALLY ARVIZU: My apologies. The -- It appears  
12 their bridge cut off right at 5:00 p.m.

13 THE COURT: Okay. We're not going to have it after  
14 that? Is that your understanding? Christine, do you know  
15 anything about it?

16 MS. SALLY ARVIZU: I'm not aware of that. If you give  
17 me a moment, I can call the prison. I can call the jail.

18 THE COURT: Counsel, is it your position they have to  
19 be present?

20 MS. HENRY: No, Your Honor. We appreciate your  
21 accommodation, but we can move forward.

22 THE COURT: You can check, but we'll go ahead. Thank  
23 you.

24 MS. HENRY: Thank you, Your Honor.

25 Q. (BY MS. HENRY) My apologies, Ms. Stenson.



1           So in 2009, your vote amongst -- was in favor of  
2       Mr. Macumber for receiving executive clemency; is that correct?

3       A. Yes.

4       Q. And that recommendation was ultimately not followed by the  
5       Governor at the time?

6       A. Correct, yes.

7       Q. And Mr. Macumber came back up for clemency again, and that  
8       time were you able to sit on the panel?

9       A. No. I had a trip planned out of state.

10      Q. And you and Mr. Belcher were the only two Board members at  
11      that time who had heard the previous commutation case; is that  
12      correct?

13      A. Yes.

14      Q. And so you had an unavoidable trip out of town, and so the  
15      Board split two/two? Is that your understanding?

16      A. Yes.

17      Q. When your term expired with the Board and you reapplied,  
18      did you have an opportunity to have an interview with the  
19      executive clemency nominating selection committee?

20      A. Yes.

21      Q. And can you describe that interview and how it compared to  
22      your previous interview?

23      A. My previous interview, my first interview with the  
24      Governor's Office, was in 2007, and it was with two  
25      individuals. This one in 2012 was there were four -- three or

1 four or five people interviewing me.

2 Q. In the 2012 interview, was it conducted in an executive  
3 session?

4 A. I came to find out later it was considered an executive  
5 session. I don't think I knew that ahead of time.

6 Q. Okay. And in the interview there were five --

7 MS. GILLILAN-GIBSON: Your Honor, I need to object at  
8 this time. Under Arizona law, things that occur in the  
9 executive session are confidential. If she discloses what  
10 happens in executive session under 38-431.03 as well as 38-504,  
11 there is potentially criminal liability, Your Honor. So I  
12 don't know if the Court should advise the witness of that prior  
13 to this line of questioning.

14 THE COURT: If it's ordered by the Court, it's no  
15 longer criminal, right?

16 MS. GILLILAN-GIBSON: Pardon?

17 THE COURT: As long as I order it?

18 MS. GILLILAN-GIBSON: I'm not sure. I mean, I think  
19 the statute says that the information is confidential, and  
20 disclosure is subject to criminal penalties. If you order it,  
21 I'm not -- it would be up to any prosecuting authority whether  
22 or not that would be sufficient. It's sort of like -- It  
23 sounds like you're trying to grant immunity.

24 THE COURT: That's true, but do you have any authority  
25 that I cannot order it under any circumstances in a federal

1 court?

2 MS. GILLILAN-GIBSON: I don't, Your Honor.

3 THE COURT: What's your position?

4 MS. HENRY: Your Honor, I would ask that you order the  
5 witness to answer the question as it relates to her being  
6 questioned regarding the Macumber case.

7 THE COURT: Well, I know you're asking that, but  
8 what's the answer to the law?

9 MS. HENRY: I don't believe that -- I believe that  
10 Your Honor has the authority to order her to answer the  
11 question and that she would not face criminal liability.

12 THE COURT: But before I do something that's void as a  
13 matter of law, then we'd better have some authority for it.

14 MS. HENRY: That I cannot provide you as I stand here  
15 today, Your Honor.

16 THE COURT: Okay. Well, then, if it was an executive  
17 session, is there any dispute that it was executive session, or  
18 is there a dispute as to whether it was not?

19 MS. HENRY: There is no dispute that they called it  
20 into an executive session. There is a huge dispute as to  
21 whether it was a proper executive session. And there's also a  
22 huge dispute as to whether or not what they did in the  
23 executive session qualified.

24 THE COURT: Was it briefed? I don't recall that it  
25 was briefed. I remember that there was an argument it was

1 executive session. There was an argument that it shouldn't  
2 have been executive session. But I'm not sure it was briefed.  
3 And I am not familiar enough with the Open Meeting law in  
4 Arizona to know whether or not I have the authority to order  
5 it. I suspect I do. But I'm not sure under what  
6 circumstances. So I'm not going to allow it.

7 MS. HENRY: Your Honor, the reason it wasn't briefed  
8 is because that objection was made just now.

9 And it would be our position that we should be given  
10 an opportunity to provide you with that information. Of course  
11 it's already before the Court in the form of a declaration.  
12 And it's our further position that particularly --

13 THE COURT: I'm certainly going to take it. It's in  
14 affidavit form. There was no objection made. I'll consider  
15 the affidavit. Anything else?

16 MS. HENRY: No, thank you, Your Honor. That's fine.  
17 Q. (BY MS. HENRY) Without going into the contents of your  
18 interview, Ms. Stenson -- That's fine. I'm not going to ask  
19 you anything more at all about the interview?

20 THE COURT: It's in the record.

21 MS. HENRY: It is in the record, Your Honor.

22 THE COURT: And I will consider what she stated.

23 MS. HENRY: Your Honor, I'm not going to ask this  
24 witness anymore questions. She's been very kind and  
25 cooperative.

STENSON - DIRECT

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1 THE COURT: Okay. Cross.

2 CROSS-EXAMINATION

3 BY MS. GILLILAN-GIBSON:.

4 Q. Ms. Stenson, did you vote independently when you were a  
5 member of the Board of Executive Clemency?

6 A. Yes.

7 Q. Did anyone tell how to vote, and did you follow through by  
8 voting the way they told you?

9 A. No one told me how to vote.

10 MS. GILLILAN-GIBSON: I have no further questions,  
11 Your Honor.

12 THE COURT: All right. Redirect?

13 MS. HENRY: No, Your Honor.

14 THE COURT: You may step down.

15 MS. HENRY: Your Honor, in light of defendant's  
16 counsel's most recent objection, may I have a moment to confer  
17 with counsel before I call my next witness?

18 THE COURT: The witness is still in the courtroom.  
19 Any objection to excusing her?

20 MS. GILLILAN-GIBSON: No, Your Honor.

21 MS. HENRY: Thank you, Your Honor. I apologize.

22 Plaintiff Schad calls Marilyn Wilkens.

23 THE COURT: Thank you.

24 MS. HENRY: Who was right behind me.

25 THE CLERK: Can you please come forward, all the way

UNITED STATES DISTRICT COURT

1 up here.

2 MARILYN LEE WILKENS, PLAINTIFFS' WITNESS, SWORN

3 THE CLERK: State your name for the record spell your  
4 last name please.

5 THE WITNESS: Marilyn Lee Wilkens, W-i-l-k-e-n-s.

6 DIRECT EXAMINATION

7 BY MS. HENRY:

8 Q. Good afternoon, Ms. Wilkens.

9 A. Good afternoon.

10 Q. Ms. Wilkens, did you serve as a member of the Arizona Board  
11 of Executive Clemency?

12 A. Yes, I did.

13 Q. When were you first appointed?

14 A. In January of 2010.

15 Q. When you were initially appointed as a member of the  
16 Arizona Board of Executive Clemency, did you receive an  
17 interview in 2010?

18 A. No, I did not.

19 Q. You were appointed?

20 A. Correct. And it was explained to me because I was filling  
21 out somebody's term.

22 Q. So you were completing a five-year term of someone else?

23 A. That is correct.

24 Q. And when you applied for reappointment, what year was that?

25 A. When I applied for it, I believe it was in the latter part



1 of fall to winter, like November of 2011.

2 Q. Thank you. During the time that you served as a member of  
3 the Arizona Board of Executive Clemency, did you have an  
4 opportunity to sit on one of the Board's cases involving a  
5 gentleman by the name of Bill Macumber?

6 A. Yes, I did.

7 Q. And how did you vote in that case?

8 A. I voted against any clemency action for him.

9 Q. And also while you were a member of the Arizona Board of  
10 Executive Clemency did you have an opportunity to sit on a case  
11 with a gentleman by the name of Flibotte?

12 A. Yes, I did.

13 Q. And can you tell us how you voted in that case?

14 A. I did vote, along with the remainder of the Board, the  
15 other members participating in that hearing, to recommend  
16 clemency action for him to the Governor's Office.

17 Q. And, Ms. Wilkens, I'm going to ask some very specific  
18 questions right now, okay?

19 When you applied for reappointment, you were not  
20 reappointed; is that correct?

21 A. That is correct.

22 Q. And what is -- Did you form -- Let me ask -- I'm going to  
23 back up. I'm trying to ask specific questions.

24 When you went in to be -- Did you receive an interview  
25 for the reappointment?

1 A. Yes, I did.

2 Q. And can you tell the Court who was present during the  
3 interview?

4 A. We were led -- I was led into the interview room where the  
5 interview was conducted by, I believe, Ms. Stiles, and then  
6 present were Scott Smith, Joe Sciarrotta, Eileen Klein, I  
7 believe you pronounce his name Mr. Halliday, and Mr. Ryan,  
8 and -- Yes.

9 Q. And Ms. Stiles is head of Boards & Commissions?

10 A. Correct.

11 Q. Mr. Halliday is head of DPS?

12 A. Correct.

13 Q. Mr. Ryan is head of the Department of Corrections?

14 A. Correct.

15 Q. Ms. Klein was at the time Governor Brewer's Chief of Staff?

16 A. You know, I don't know exactly what her position was at  
17 that time.

18 Q. But she was with the Governor's Office?

19 A. Okay.

20 Q. Is that correct?

21 A. Yes, she was with the Governor's Office.

22 Q. Scott Smith was also with the Governor's Office?

23 A. That's correct.

24 Q. And Joe Sciarrotta was the Governor's General Counsel?

25 A. Correct.

1 Q. Did you know Scott Smith prior to that interview?

2 A. Oh, absolutely.

3 Q. How long have you known Scott Smith?

4 A. I would say close to 20-plus years.

5 Q. Did you know -- And I should ask you this. Before you were  
6 a member of the Arizona Board of Executive Clemency, did you  
7 serve some time in public service working for the state?

8 A. Yes. I worked for the Department of Corrections for the  
9 longest period of time but also actually the Governor's Office  
10 at one point, Department of Administration, Department of  
11 Health Services.

12 Q. Did you know Mr. Smith as a result of your employment with  
13 the Department of Corrections?

14 A. Yes, I did.

15 Q. And you knew him back when he worked for Sam Lewis?

16 A. That's correct, as legislative liaison.

17 Q. And you also have a longstanding relationship with  
18 Mr. Ryan; is that correct?

19 A. Correct.

20 Q. Now, Ms. Wilkens, I do not want to ask you any questions  
21 about what happened in terms of the content of the questions  
22 that were asked you within your job interview, okay?

23 A. Okay.

24 Q. Were you told before you went to your job interview that it  
25 was going to be an executive session?

1 A. No, I was not.

2 Q. If you had been given an opportunity to object to your  
3 interview being in executive session, would you have objected?

4 A. Yes.

5 Q. Did you know you could object when you were called in for  
6 the job interview?

7 A. No.

8 Q. Ms. Wilkens, did you provide a declaration to counsel --  
9 not to me -- but for someone from the Federal Public Defender's  
10 Office --

11 A. Yes --

12 Q. -- here in Arizona?

13 A. -- I did.

14 Q. I just spoke over you. I'm sorry. Yes, you did?

15 A. Yes, I did.

16 MS. HENRY: And, Your Honor, if I may provide  
17 Ms. Wilkens with a copy of that declaration? And could I  
18 please have this marked as Plaintiffs' Exhibit No. 2?

19 THE COURT: Yes. And, counsel, we're going to have to  
20 take a break. I have someone I have to talk to at 5:15,  
21 shouldn't take more than 15, 20 minutes. We'll take a break.

22 MS. HENRY: Thank you.

23 (Proceedings recessed at 5:16 p.m.)  
24  
25

C E R T I F I C A T E

I, LINDA SCHROEDER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 2nd day of October, 2013.

s/Linda Schroeder  
Linda Schroeder, RDR, CRR

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

\_\_\_\_\_  
Edward Harold Schad, Jr.,                     )  
Robert Glen Jones, Jr.,                     )  
                                                           )  
                                                           ) Plaintiff,                     )  
                                                           ) CV-13-1962-PHX-ROS  
                                                           ) Phoenix, Arizona  
                                                           ) vs.                     )  
                                                           ) October 1, 2013  
                                                           ) 5:58 p.m.  
Janice K. Brewer, et al.,                     )  
                                                           )  
                                                           ) Defendants.                     )  
\_\_\_\_\_

BEFORE: THE HONORABLE ROSLYN O. SILVER, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING - VOLUME II

(Pages 64 through 120, inclusive.)

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P R O C E E D I N G S

(Called to the order of court at 5:58 p.m.)

THE COURT: Thank you for your indulgence. We have had a -- I've had a busy day. You've had a busy day. But there will be no other interruptions. I have rescheduled the remaining of my meetings, so we can go now. Okay. Go on.

MS. HENRY: Thank you, Your Honor. If we could have just -- using the break, we had an opportunity to review some case law regarding the Executive Sessions law.

THE COURT: Well, let me give you my point of view on that.

Number one, I think that there was no objection made, so it has been waived. And they chose not to cross-examine the witnesses on it, so I'm going to take the information as it's written.

Second is that my view is that the federal law preempts the state law on this issue. So that's where we are. So you don't need to do any more than that.

I'm going to consider the affidavits that have been submitted as they have been written. And I will review them based upon the rules of evidence, that which can be taken for the truth of what is asserted, because some of this is direct personal information. I will consider that.

I will also consider whether or not it's hearsay. If it's hearsay, it's hearsay. Okay. Go ahead.

1 MS. HENRY: Thank you, Your Honor.

2 **MARILYN WILKENS, WITNESS, SWORN**

3 **DIRECT EXAMINATION (cont'd)**

4 BY MS. HENRY:

5 Q Ms. Wilkens, when we left off, I believe I had just asked  
6 you about your interview and that it was in Executive Session.

7 Given what the Judge has just clarified for all of us  
8 on the record, I'm going to speed through your testimony here  
9 because we have your declaration.

10 So let me ask you about your declaration --

11 A All right.

12 Q -- which is in front of you and we don't need to introduce  
13 it as an exhibit because it's in the record as document 1-7.

14 Did you sign that declaration?

15 A Yes, I did.

16 Q Is everything that's in the declaration true to the best  
17 of your knowledge and belief?

18 A Yes, it is.

19 Q Ms. Wilkens, did you want to continue to serve on the  
20 Board?

21 A Yes, I did.

22 Q Why did you want to continue to serve on the Board?

23 A You know, I felt that -- I believe my background that I  
24 had with the Department of Corrections in both understanding  
25 inmates and programs, as well as in healthcare, was a good fit

1 for the Board and being able to use my experience in sitting  
2 on the Board and make some very good decisions.

3 Q Ms. Wilkens, when you were sitting on the Board, did you  
4 always vote according to your conscience?

5 A Yes. And based on the facts that were in front of me,  
6 because there was a considerable amount of reading that you  
7 had to do for each case in many instances, such as clemency,  
8 and it was based on the facts --

9 Q So you --

10 A -- also and my conscience.

11 Q Why do you believe you were not reappointed to the Board?

12 A Because I did not vote the way the ninth floor wished and  
13 the Governor's Office and staff wished me to vote on the case  
14 of Mr. Flibotte.

15 MS. HENRY: Thank you, Ms. Wilkens. I don't have any  
16 more questions.

17 THE COURT: Cross.

18 **CROSS EXAMINATION**

19 BY MS. GILLILAN-GIBSON:

20 Q Ma'am, it's your testimony that no one influenced your  
21 votes when you were on the Board?

22 A That is correct.

23 Q And regarding the Mr. Flibotte case, Ms. Kirschbaum also  
24 voted to recommend clemency in that matter, didn't she?

25 A That is correct.

1 Q And Ms. Kirschbaum actually wrote the decision  
2 recommending the commutation to the Governor in that case;  
3 isn't that correct?

4 A I cannot say for sure.

5 Q Okay. And Ms. Kirschbaum is still on the Board?

6 A That is correct.

7 MS. GILLILAN-GIBSON: I have no further questions.

8 THE COURT: All right. Redirect.

9 MS. HENRY: Nothing further, Your Honor.

10 THE COURT: You may step down and thank you. Next.

11 THE WITNESS: Should I leave this here?

12 THE COURT: Please do.

13 THE WITNESS: Okay.

14 MS. HENRY: Your Honor, Plaintiff Schad rests.

15 **PLAINTIFF RESTS**

16 **DEFENDANTS' ORAL MOTION TO DISMISS**

17 MS. GILLILAN-GIBSON: Your Honor, at this time I  
18 would move for the Court to deny plaintiff's request for a  
19 TRO.

20 I think if you look at the decision that we cited in  
21 our Motion to Quash the subpoena in the *Parker* case, this case  
22 is very analogous to that case.

23 It's a very high burden. They have to prove that  
24 there is some type of bias. And none of their witnesses have  
25 demonstrated any bias as to the Board members. Not a single



1 witness said that these Board members would not vote fair and  
2 impartially. None of the witnesses said that these Board  
3 members were directed to vote in a certain way.

4 So in light of the lack of testimony establishing any  
5 bias for this Board, I think the Court, especially under  
6 *Parker*, and the standard for a TRO, needs to deny the TRO at  
7 this point in time.

8 THE COURT: All right. Let me hear in response. And  
9 as you have all briefed quite well, you understand what the  
10 law is.

11 There is the starting point, which was Justice  
12 O'Connor's opinion about minimal procedural safeguards to  
13 clemency, and then there are a few decisions that have  
14 followed that.

15 The Eighth Circuit decision, I suppose, would be the  
16 one that is -- you would say would be most analogous. On its  
17 face, though, it looks as if it is distinguishable. I do  
18 understand and have read that there are regulations in Arizona  
19 that would establish without question what the due process  
20 requirements are for clemency matters.

21 However here, the Court analogized -- and I'm talking  
22 about the *Young* case -- analogized what had occurred, and that  
23 is the purported threat to an attorney in the prosecutor's  
24 office who was intended to provide information in a clemency  
25 hearing that she would be fired.

1 And so what the Court did is analogized that to  
2 intimidating a witness before an official proceeding. And I  
3 think "official proceeding" there would probably be an  
4 "official proceeding" here in accordance with what the  
5 Clemency Board guidelines are.

6 They also cite to a criminal statute which is -- and  
7 that is a federal criminal statute which is the comparable  
8 federal statute for threatening a witness.

9 So but that case is different, isn't it? We don't  
10 have threatening a witness here. We're the minimal -- as of  
11 right now, based upon what you've presented, the minimal  
12 procedural safeguards -- and we all know that there must be  
13 minimal procedural safeguards.

14 MS. HENRY: Yes, ma'am. Are we now at a point  
15 where -- I'm sorry. I'm not clear. Are the defendants not  
16 presenting any testimony?

17 THE COURT: No. No. They're asking -- they're  
18 basically -- it's your burden.

19 MS. HENRY: I understand that.

20 THE COURT: Okay. So it's in a sense if this was a  
21 trial, it's a Rule 50 JMAL argument that they are making that  
22 you haven't made -- on the face of your evidence, you have not  
23 made a case that would establish a Temporary Restraining Order  
24 is required.

25 MS. HENRY: And I respectfully disagree with the

1 government's position. And I guess if it's all right with the  
2 Court, I would like to combine my arguments on the Motion to  
3 Quash along with their objections.

4 THE COURT: Well, your Motion to Quash is -- as I  
5 indicated to you, I am not going to allow discovery in this  
6 case that is tangential or that is tenuous. It's not even  
7 tangential. It's really tenuous.

8 It looks as if you're looking for something. And you  
9 mentioned -- and I think I understand and I think he did -- he  
10 did -- he was candid. He did the best he could -- and that  
11 was former Board member Thomas -- what he had been shown.

12 But the authenticity of that is not clear to me. It  
13 wasn't clear to him. It's not clear it was a letter. We  
14 don't know who sent it.

15 He used the word "implied, implied, implied." So,  
16 you know, I don't know where that came from. I don't know  
17 what it is. I don't know what you would be subpoenaing in  
18 order to -- that would -- that would require that this Court  
19 open the doors to discovery before I considered whether or not  
20 to grant or deny a Temporary Restraining Order.

21 MS. HENRY: Your Honor, if I may, *Young v. Hayes*, is,  
22 in fact, the case that we are relying on. And it is our  
23 position that minimal due process includes a guarantee that  
24 there be no official intimidation or frustration of the  
25 clemency process.

1           It is our position that, yes, we have defendants who  
2 say, no, we won't be affected, but that does not have to be  
3 taken at face value.

4           What Mr. Thomas told this Court today is that  
5 somebody showed him what he took to be and what he signed a  
6 declaration saying was a letter. And the purpose of that  
7 letter was to intimidate his vote.

8           Now he said he wasn't intimidated.

9           THE COURT: No, he didn't quite say that. He said  
10 that the individual implied that there was something at some  
11 time from the Governor or somewhere to indicate that there was  
12 intimidation coming from the Governor.

13           I mean, it was so vague to me and it was -- and he  
14 clarified to me what he said in the affidavit. He was very  
15 careful about what he said.

16           Now we would have to look at the transcript, but I  
17 think you are extrapolating to a point which is broader than  
18 what he actually said.

19           MS. HENRY: And I will agree that, obviously, I'm  
20 tired. I have been working a long time. I think I know what  
21 I heard and the transcript is going to bear out what I heard.

22           What I heard Mr. Thomas say is that the letter -- and  
23 he said more to you than he's ever said to me, which for me  
24 made me want that letter even more -- which is that he  
25 believed -- and this is my memory of the testimony -- that the

1 person showed him the letter. The letter itself was  
2 expressing displeasure with a particular vote on behalf of  
3 many Board members. And that the person who showed it to him  
4 implied some sort of intimidation factor to him.

5 THE COURT: Well, I'm not sure -- I asked him what  
6 the content of the letter was.

7 MS. HENRY: And that's why we need discovery.

8 THE COURT: Okay. No. No. No.

9 He couldn't remember it. What he said was that the  
10 individual, whoever this person was, seemed to imply that this  
11 was something that came from the Governor.

12 And I don't know. And so it's very vague to me. We  
13 don't know who the individual is. We don't know if, in fact,  
14 that's what it said. We don't know what the content was. You  
15 know, it's unclear to me.

16 MS. HENRY: Your Honor, and again, the testimony is  
17 going to be what the testimony is.

18 THE COURT: Let me just short circuit this.

19 This doesn't have to be done overnight. You can  
20 subpoena that letter now. I will take it under advisement.

21 If there is such a letter that ever existed, then you  
22 are to produce that letter and that's an order of the Court.

23 MS. GILLILAN-GIBSON: Just in order to find the  
24 letter, it would be helpful to know who it was sent by,  
25 whether any Board members --

1 THE COURT: That's correct.

2 MS. GILLILAN-GIBSON: I mean, if I can --

3 THE COURT: I agree with you. I agree with you.

4 You heard the same testimony I did. So you can look.  
5 That was testimony under oath. And he did the best he could.  
6 I don't know who the individual is.

7 Mr. Thomas, I'm going to respect what he has said,  
8 which is he wants to check with this individual to ask him if  
9 it's okay to turn this over.

10 Mr. Thomas, I'm going to order you to check with this  
11 individual and ask the individual if it's-- if it's okay to  
12 disclose who he is. And then, once you get that information,  
13 then you can try to get the letter from this individual.

14 But that's all we have. And, you know, let me check  
15 my notes here, but I think as I recall -- I don't have -- so  
16 it was sometime between April of 2012 and August of 2013? Is  
17 that --

18 MS. HENRY: Yes, ma'am.

19 THE COURT: Is that it?

20 MS. HENRY: Yes, ma'am.

21 THE COURT: So --

22 MS. GILLILAN-GIBSON: Your Honor, may I be heard on  
23 your order? I think you need to distinguish the fact that,  
24 you know, even if that letter existed, it went to Mr. Thomas.

25 There is no evidence that any of the three --



1 THE COURT: It went to who? It went to who?

2 MS. GILLILAN-GIBSON: It went to Melvin. Melvin is  
3 the one who saw the letter. Mr. Thomas did not know whether  
4 any of the other Board members received it. He doesn't even  
5 know if the letter was sent. I mean, you have three Board  
6 members now --

7 THE COURT: That's true. That's true.

8 MS. GILLILAN-GIBSON: There is no evidence they have  
9 been threatened.

10 THE COURT: If there's no letter, you have nothing to  
11 worry about.

12 Okay. We have enough on the record from Mr. Thomas  
13 that someone implied that this letter came from the Governor  
14 or the Governor's staff and that it was a letter that was  
15 threatening to the Board.

16 And whether that's true or not true, I don't know.  
17 Mr. Thomas said I'm not threatened by it. And I don't even  
18 know if he really understands what he read. And I'm not sure  
19 that he thought the individual who gave it to him was  
20 credible.

21 So, all right, I'm going to allow this. If, in fact,  
22 it is certainly going to take in -- I'm going to take it into  
23 account on the TRO.

24 If there is a letter that was issued by the  
25 Governor's Office by the Governor or anyone in her employ that

1 was to the Board members that threatened them about clemency,  
2 then that's something I'm going to consider.

3 That doesn't mean I'm going to grant the TRO or I'm  
4 going to deny it, but that certainly would be relevant. I  
5 can't tell at this point whether it exists. I can't tell if  
6 it's relevant. I can't tell anything other than --  
7 particularly by the demeanor of Mr. Collins -- or excuse me,  
8 Mr. Thomas -- whether or not he believed it was ever written  
9 by the Governor. It was something that was said to him.

10 So, okay. So the Motion to Dismiss the Temporary  
11 Restraining Order will be taken under advisement. And,  
12 Mr. Thomas, you are to determine whether or not that you can  
13 disclose the name of this individual. You can ask them  
14 whether or not -- and if they don't want their name disclosed,  
15 then you're going to have to inform the Court as to why they  
16 don't want their name disclosed.

17 And I may even require that the name be disclosed to  
18 me in camera depending upon the reasons. And then I will  
19 decide at this point whether or not the name should be  
20 disclosed. Because, as I said, in the worst case scenario, it  
21 could be relevant to the Temporary Restraining Order. But  
22 it's so vague at this point that I'm inclined to think that I  
23 can't even consider it.

24 So, the motion is taken under advisement and we start  
25 with Mr. Thomas contacting this individual, asking the

1 individual whether or not he's willing to have this  
2 information disclosed, whether or not he has a copy of the  
3 letter. If he has a copy of the letter, then you can let  
4 counsel know it can be subpoenaed. A copy, of course, is to  
5 go to defense counsel also.

6 And if he doesn't have a copy of the letter, then  
7 more information so that that letter can be subpoenaed from  
8 defense counsel if it exists at all. Okay. Is it clear?

9 MS. GILLILAN-GIBSON: Your Honor, should we have an  
10 opportunity then to put on the current Board members to finish  
11 this case and to demonstrate that they have no bias and they  
12 have never been threatened?

13 THE COURT: Sure. You can do that now.

14 MS. GILLILAN-GIBSON: Okay. Your Honor, at this time  
15 I will call Jack LaSota.

16 THE CLERK: State your name and spell your last name  
17 for the record.

18 THE WITNESS: John A. LaSota, Jr. L-A-S-O-T-A.

19 **(Witness duly sworn)**

20 THE CLERK: Thank you. Please have a seat on the  
21 witness stand.

22 THE WITNESS: Thank you.

23 THE COURT: So you're also known as John?

24 THE WITNESS: I am, Judge. I am.

25 THE COURT: All right. Go ahead.

1                   **JOHN A. LaSOTA, JR., WITNESS, SWORN**

2                   **DIRECT EXAMINATION**

3           BY MS. GILLILAN-GIBSON:

4           Q    Mr. LaSota, how are you currently employed?

5           A    Well, I'm a member of the Arizona Board of Executive  
6           Clemency.

7           Q    And what is your professional background?

8           A    Well, I have an undergraduate degree in business  
9           management from Arizona State and I have a law degree from the  
10          University of Arizona. And I did some graduate work at  
11          Northwestern University Law School and for 40 years was an  
12          attorney.

13          Q    And as an attorney, did you hold any political positions?

14          A    Yes, I did.

15          Q    And what did you hold?

16          A    Well, I -- as an elected official, elected position, I was  
17          Attorney General for nine or ten months in 1978. And then I  
18          held a variety of other positions in local and state  
19          government.

20          Q    Okay. And are you a current member of the Arizona Bar?

21          A    I am not.

22          Q    Okay. So, Mr. LaSota, when were you appointed to the  
23          Board?

24          A    I believe that it was April of 2010.

25          Q    Okay.

1 A Might have been May.

2 Q Okay. And since you have been on the Board, have you ever  
3 been contacted regarding how you voted?

4 A No, ma'am.

5 Q Okay. Have -- has anyone ever threatened you and said  
6 you're going to be fired if you don't vote a certain way?

7 A Oh, no.

8 Q And if someone had attempted to influence you, what would  
9 you have done?

10 A I have had a tough time doing exactly the opposite of what  
11 I was asked to do. I probably would have restrained myself  
12 because it might have -- they might have been after the  
13 correct result in my view.

14 But my normal inclination, if I were ever threatened  
15 or intimidated or suggested how my vote ought to go, I think  
16 my basic inclination, I would have to overcome the tendency to  
17 do just the opposite.

18 Q Okay. And so when you vote now on the Board, what's the  
19 basis for your vote?

20 A Well, I try to base it on what comes before me, what  
21 evidence is presented, what arguments are made by counsel.

22 And I sort of weigh that through the crucible of my  
23 experience. I try to, you know, achieve a just result, just  
24 and lawful result.

25 Q Has anyone contacted you regarding the Schad or the Jones

1 upcoming clemency matters?

2 A No.

3 Q Has anyone told you how to vote?

4 A No.

5 Q Do you know how you're going to vote?

6 A No.

7 Q Okay. Mr. LaSota, did you vote to recommend clemency in  
8 the Macumber case?

9 A The one time I heard the Macumber case, yes, I did.

10 Q Okay. And after that case were you threatened or yelled  
11 at because you voted to recommend clemency?

12 A No.

13 Q And you weren't removed from the Board, obviously,  
14 correct?

15 A That's correct.

16 Q Okay. And then there was another high-profile case,  
17 Flibotte. Am I pronouncing it?

18 What was your vote in that case?

19 A I voted to recommend clemency for Mr. Flibotte. And, by  
20 the way, it was unanimous. That vote was a unanimous vote.

21 Q Okay. Did anyone contact you either in writing or e-mail  
22 or phone call suggesting that you shouldn't have voted that  
23 way?

24 A No.

25 Q And so have you ever personally received a letter from the



1 Governor, from Scott Smith, anyone associated with the  
2 Governor's Office, threatening you or telling you how to vote?

3 A No.

4 Q Is there anything -- any comments or anything at all that  
5 has been said to you that would influence how you would vote  
6 on Mr. Schad's clemency hearing tomorrow?

7 A Well, sure. We have documents presented by Mr. Schad that  
8 I have read in preparation for the hearing tomorrow. And if I  
9 were -- if I vote in favor of Mr. Schad's commutation, it  
10 would have to be said that they have had some influence on me.

11 Q Okay. Anyone outside of the materials or his advocate or  
12 anyone who has sent letters on his behalf, is there anyone  
13 outside of the process that has influenced you or dictated to  
14 you how you should vote?

15 A No, ma'am.

16 Q If you vote for clemency, do you think you're going to  
17 lose your job?

18 A No. That's ridiculous. I have never been in danger of  
19 losing this job. I think the only danger is if one desires to  
20 be reappointed, then it becomes a decision on your future is  
21 in the hands of the Governor's Office, and correctly so.

22 But my job is protected by the First Amendment and  
23 the fact that the law says that I am only removable for cause.  
24 And I don't think voting -- I don't think any Court in the  
25 land would say that voting in a manner that offended a

1 Governor's Office was itself cause.

2 So I don't consider myself in danger. In addition,  
3 I'm not a candidate -- I don't want to have my -- another  
4 five-year term anyway.

5 Q Sir, when does your term expire?

6 A I hate to say I'm not quite sure, but I think it's the  
7 second Monday in January 2014.

8 Q As a Board member, Mr. LaSota, you're familiar with the  
9 Open Meetings law; is that correct?

10 A Yes, I am. Well, not just as a Board member. I have had  
11 a long history of exposure to it.

12 Q While on this Board, did a quorum of the Board ever meet  
13 and discuss Schad in private?

14 A Not to my knowledge.

15 Q Okay. Did you ever hear anybody from the Board  
16 predetermine or voice how they were going to vote on the Schad  
17 matter?

18 A No, ma'am.

19 MS. GILLILAN-GIBSON: Your Honor, may I just have a  
20 moment?

21 THE COURT: Sure.

22 MS. GILLILAN-GIBSON: I have no further questions,  
23 Your Honor.

24 THE COURT: All right. Cross.

25 MS. HENRY: None, Your Honor.

1 THE COURT: Redirect. Just kidding. A little joke.

2 THE WITNESS: Do you want to ask me anything?

3 THE COURT: You may step down.

4 THE WITNESS: Thank you, Your Honor.

5 MS. GILLILAN-GIBSON: Your Honor, I would like to  
6 call Ellen Kirschbaum to the stand.

7 THE COURT: All right.

8 THE CLERK: Please state your name and spell your  
9 last name for the record.

10 THE WITNESS: Ellen Kirschbaum. K-I-R-S-C-H-B-A-U-M.

11 THE CLERK: Your right hand.

12 THE WITNESS: Oh. I'm left-handed.

13 (Witness duly sworn)

14 THE CLERK: Please have a seat on the witness stand.

15 MS. HENRY: May I proceed, Your Honor?

16 ELLEN KIRSCHBAUM, WITNESS, SWORN

17 DIRECT EXAMINATION

18 BY MS. GILLILAN-GIBSON:

19 Q Ms. Kirschbaum, tell the Court how you're currently  
20 employed.

21 A I'm currently a member of the Arizona Board of Executive  
22 Clemency.

23 Q Ms. Kirschbaum, who's the current members of the Board  
24 right now?

25 A Current members, Chairman Brian Livingston, Mr. Jack

1 LaSota, myself Ellen Kirschbaum, and we currently have a new  
2 member Ms. Donna Harris.

3 Q And so Mr. Thomas is not on the Board right now?

4 A No longer.

5 Q Okay. So, Ms. Kirschbaum, do you vote independently when  
6 you're sitting on the Board and making decisions?

7 A Absolutely.

8 Q Okay. Has anyone ever contacted you either via e-mail,  
9 writing, phone call telling you how to vote?

10 A No.

11 Q Have you received any letters, e-mail, phone calls saying  
12 you're going to lose your job if you vote a certain way?

13 A No.

14 Q Ms. Kirschbaum, did you write the recommendation in the  
15 Flibotte case to Governor Brewer?

16 A I wrote the recommendation as well as I made the initial  
17 motion.

18 Q Okay. And when you say "initial motion," can you just  
19 explain to the Court what that means?

20 A I was the person who made the motion to commute his  
21 sentence. And then the rest of the Board members would --  
22 someone would second it and they would agree or disagree.

23 Q Okay. And after that vote, were you ever contacted by  
24 anyone in the Governor's Office complaining that you voted to  
25 recommend clemency -- or commutation, excuse me?

1 A No.

2 THE COURT: How long have you been on the Clemency  
3 Board?

4 THE WITNESS: I have been on, Your Honor, since  
5 December 2010.

6 THE COURT: Thank you.

7 BY MS. GILLILAN-GIBSON:

8 Q And, Ms. Kirschbaum, have you voted to recommend clemency  
9 on any other high-profile cases?

10 A Yes. I can recall Betty Smithey. I recall -- I don't  
11 know if you would consider it high-profile -- Mr. Erik Oman.  
12 And then there was another gentleman in another case with a  
13 young African-American woman who had killed her baby.

14 Q And after any of those cases, were you ever confronted  
15 regarding your vote?

16 A No.

17 Q Do you have any bias against Mr. Schad?

18 A Absolutely, not.

19 Q Has anyone contacted you to tell you how you should vote  
20 as to Mr. Schad?

21 A No.

22 Q Did you ever have a conversation with Mr. Thomas and  
23 Mr. Livingston stating how you were going to vote on  
24 Mr. Schad?

25 A Absolutely, not.

1 Q And why should we believe you?

2 A Because I'm an honest person. I have integrity. I serve  
3 on another -- a number of other boards. I would not do that.  
4 It's against my morals.

5 Q What would you do if you heard other Board members  
6 predetermining a case?

7 A I would report it.

8 Q And are the allegations made by Mr. Hernandez against  
9 you -- how do you feel about those?

10 A I feel terrible.

11 MS. HENRY: Objection.

12 THE COURT: Objection what?

13 MS. HENRY: The witness's feelings are not relevant  
14 to the question.

15 THE COURT: I'm going to sustain the question on  
16 speculation.

17 BY MS. GILLILAN-GIBSON:

18 Q Can you be fair in the clemency hearing tomorrow?

19 A Yes.

20 Q And, again, I just want to repeat one more time. No one  
21 has told you how to vote tomorrow?

22 A No.

23 Q And you take your job very seriously?

24 A Very seriously. These are people's lives.

25 MS. GILLILAN-GIBSON: I have no further questions,



1 Your Honor.

2 THE COURT: Cross?

3 MS. HENRY: Thank you, Your Honor.

4 **CROSS EXAMINATION**

5 BY MS. HENRY:

6 Q Ms. Kirschbaum, you were appointed in 2010; is that  
7 correct?

8 A Correct.

9 Q You have not been up for reappointment since you voted for  
10 Mr. Flibotte?

11 A No. I'm up January 2015.

12 Q So the votes that you have discussed with the Court where  
13 you were a positive or favorable vote, all have occurred  
14 within a first term?

15 A Correct.

16 Q In your declaration and affidavit you said:

17 I have never been told that my voting record may be  
18 considered cause for dismissal during my term.

19 Do you believe that your votes in the case could be a  
20 cause for not -- for you to not be reappointed?

21 A I'm sorry. I don't understand your question. Could you  
22 repeat it?

23 Q Do you believe that your votes would be a reason why you  
24 would not be reappointed?

25 A No.

1 Q Have you -- did you tell -- well, let me ask you this  
2 question. Back up.

3 You penned the letter for Mr. Flibotte; is that  
4 correct?

5 A Correct.

6 MS. HENRY: Your Honor, if Ms. Kirschbaum could be  
7 shown Plaintiff's Exhibit No. 3?

8 THE COURT: Yes.

9 MS. HENRY: And that letter is the Flibotte letter.

10 THE COURT: All right.

11 BY MS. HENRY:

12 Q Ms. Kirschbaum, the court officer has placed in front of  
13 you Plaintiff Schad's Exhibit No. 3.

14 Do you recognize that letter? There are two letters  
15 there, actually; one dated May 23, 2012 and one attached to it  
16 dated February 2nd, 2012. Do you recognize that there?

17 A I recognize the February 2nd, 2012 letter.

18 Q That is the letter that you authored?

19 A Correct.

20 Q And the positive vote for Mr. Flibotte came on what date?  
21 February 2nd, 2012?

22 A No. This was the date the letter was drafted.

23 I don't recall the date -- yes. We met on January  
24 26, 2012.

25 Q And all five members signed; is that correct?

1 A Yes.

2 Q And then so as a result of that, that letter was forwarded  
3 to the Governor?

4 A Correct.

5 Q For her to make a decision?

6 A Correct.

7 Q Two months later, three members of the Board were not  
8 reappointed to their terms; is that correct?

9 A That's correct.

10 Q In April of 2012?

11 A That's correct.

12 Q Three of the signatures to this letter were removed from  
13 the Board?

14 A Their term was not reappointed.

15 Q And two of them are good friends of yours?

16 A That's correct.

17 Q And you know they believe they were ousted for their vote?

18 A That's correct.

19 Q And you share that belief?

20 A I don't know.

21 Q The letter on top dated May 23rd, 2012, do you recognize  
22 that as the typical letter that would be sent to an inmate who  
23 was denied clemency by the Governor?

24 A I suspect it's the typical letter.

25 Q And Mr. Flibotte was, in fact, informed that the Governor

1 had denied him clemency in May of 2012; May 21st of 2012. Is  
2 that correct?

3 A Would you please repeat the question?

4 Q The Governor denied Mr. Flibotte clemency on May 21st,  
5 2012, the second page.

6 A That's correct.

7 Q And that was one month after Mr. Belcher, Ms. Wilkens, and  
8 Ms. Stenson had not been reappointed?

9 A Yes.

10 Q Ms. Kirschbaum, have you joined a pending complaint  
11 against Mr. Hernandez that's been filed with the Department of  
12 Administration?

13 A Yes.

14 Q And that is still ongoing?

15 A Yes.

16 Q Is that correct?

17 A Yes.

18 Q And you were quite pleased the day that Mr. Hernandez  
19 resigned?

20 A I was happy about the Board being able to move forward in  
21 a positive, effective, and fair manner.

22 Q And you were very happy to see Mr. Hernandez go?

23 A I wouldn't say I was happy. It had a great impact on the  
24 Board.

25 Q And you are aware, are you not, that efforts have been

1 made to attempt to convince Mr. Thomas to seek reappointment  
2 to his position now that Mr. Hernandez is gone?

3 A Mr. Hernandez -- Mr. Thomas was an asset as a member. All  
4 of us were very differing in our opinions. And so the fact  
5 that we lost someone that was a very good Board member was  
6 very disturbing.

7 Q And so the answer to my question is "yes," efforts have  
8 been made to get Mr. Thomas to be reappointed?

9 A We have joked around about him reapplying. I wouldn't  
10 call it "efforts."

11 Q And the day that Mr. Hernandez resigned, you already knew  
12 that his replacement was going to be Donna Harris, didn't you?

13 A No.

14 Q Did you tell someone that Donna Harris would be the next  
15 appointee and that she was currently being vetted?

16 A I did not know Donna Harris was going to be the new member  
17 until I received a call from Linda Stiles at the Board asking  
18 if I would speak to Ms. Harris about being a member of the  
19 Board, what transpires when you're on the Board, and what the  
20 responsibilities were.

21 Q And do you recall that you knew that on the day that  
22 Mr. Hernandez left in August of 2013?

23 A No.

24 MS. HENRY: One moment, Your Honor.

25 BY MS. HENRY:

1 Q Did you send an e-mail on August 17th to Ms. Wilkens and  
2 Ms. Stenson indicating -- next page of the e-mail please --  
3 right above the "let's plan to get" -- "dinner" -- the line  
4 above:

5 I can tell you that a seat is being filled by Donna  
6 Harris, a/k/a Donna Knudsen/Clements.

7 A Yes. That was after the phone call from Linda Stiles.

8 Q On August 17th, 2013, which was the day Mr. Hernandez  
9 resigned?

10 A August 17th was a Saturday.

11 Q Do you know the day that Mr. Hernandez resigned?

12 A No.

13 MS. HENRY: No further questions, Your Honor.

14 THE COURT: Redirect.

15 MS. GILLILAN-GIBSON: Just briefly.

16 **REDIRECT EXAMINATION**

17 BY MS. GILLILAN-GIBSON:

18 Q Ms. Kirschbaum, Mr. Thomas was already gone prior to  
19 Mr. Hernandez's resignation, right?

20 A That's correct. He left sometime in July.

21 Q And didn't Mr. Livingston take Mr. Hernandez's spot as  
22 Chairman and Executive Director?

23 A That's correct.

24 Q Okay. So is Ms. Harris taking over for Mr. Hernandez or  
25 was she already being vetted because of the vacancy by



1 Mr. Thomas?

2 A That was the vacancy for Mr. Thomas.

3 Q And so I just want to clarify.

4 You responded to a question where she talked about  
5 how you felt when Jesse left. And your statement was:

6 I felt like he could not impact the Board anymore.

7 So I want to make sure. Did Jesse impact the voting?

8 A He made attempts, I believe, to impact. We knew when he  
9 attended certain hearings that he was -- if he was the first  
10 to speak, to initiate, that he wanted to initiate the  
11 discussion, I don't know, but I felt it was a means to impact  
12 members.

13 Q Okay. Did you let him impact you?

14 A No.

15 Q Did you vote independently?

16 A I vote with my conscience.

17 MS. GILLILAN-GIBSON: I have no further questions.

18 THE COURT: All right. You may step down.

19 THE WITNESS: Thank you.

20 MS. GILLILAN-GIBSON: If I can call Brian Livingston.

21 THE COURT: Yes.

22 THE CLERK: Please state your name and spell your  
23 last name for the record.

24 THE WITNESS: Brian L. Livingston.

25 L-I-V-I-N-G-S-T-O-N.

1 (Witness duly sworn)

2 THE CLERK: Thank you. Have a seat on the witness  
3 stand.

4 THE WITNESS: Thank you.

5 BRIAN L. LIVINGSTON, WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MS. GILLILAN-GIBSON:

8 Q Mr. Livingston, can you tell the Court how you're  
9 currently employed?

10 A I'm currently employed as the Director and Chairman of the  
11 Board of the Arizona Board of Executive Clemency.

12 Q How long have you been Chairman and Director?

13 A Since the 19th of August of this year.

14 Q And you might have said this but I lost it.

15 When were you appointed to the Board?

16 A I was appointed to the Board in April of 2012.

17 Q Okay. Since you have been on the Board, Mr. Livingston,  
18 have you ever had any contact with anyone at the Governor's  
19 Office concerning how you vote?

20 A Never.

21 Q Have you ever received any directions indicating how you  
22 should vote?

23 A No.

24 Q Okay. How is it that you make decisions? How is it that  
25 you go about making your voting decisions?

1 A We receive a packet of information that is developed by my  
2 staff. That packet of information includes various history  
3 from the Corrections Department, as well as letters,  
4 information from the public, and verbal testimony, as well as  
5 in our final process, a deliberation process between the  
6 Board. And my decisions are made after all of that is  
7 considered.

8 Q Do you feel that your voting record -- let me take that  
9 back.

10 Do you feel like you're going to be fired if you vote  
11 the wrong way?

12 A No, I don't. I would care less if that was even implied.

13 Q Okay. Why wouldn't you care?

14 A Because my duties --

15 MS. HENRY: Your Honor, objection. Speculation.  
16 Relevance.

17 MS. GILLILAN-GIBSON: It's not speculation.

18 THE COURT: Overruled.

19 BY MS. GILLILAN-GIBSON:

20 Q Why wouldn't you care if someone told you you were going  
21 to lose your job?

22 A Because I didn't take this job to be biased. I took this  
23 job to give a fair evaluation of the facts and make a  
24 determination based on my experiences.

25 Q Have you received any communication regarding Mr. Schad's

1 or Mr. Jones's case?

2 A Would you say that again, please? I didn't hear you.

3 Q Have you received any e-mail communications, phone calls,  
4 letters, regarding the upcoming clemency hearings of  
5 Mr. Schad's and Mr. Jones case?

6 A I have, indeed.

7 Q Okay. And what have you received?

8 A I have received letters from the public, letters from  
9 attorneys, calls from attorneys, and the packet of information  
10 developed by my staff for those cases.

11 Q Have you received any information directing you how to  
12 vote?

13 A Absolutely, not.

14 Q And if you would receive such information, what would you  
15 do?

16 A What would I do? I would -- now as the Director I would  
17 inform law enforcement that there is a violation of --  
18 potential violation of tampering with somebody who is working  
19 as a government official.

20 Q Mr. Livingston, did you participate in a conversation with  
21 Ms. Kirschbaum and Mr. Thomas where you indicated how you were  
22 going to vote in the Schad matter?

23 A No, because I never made such a determination.

24 Q Did you witness any of the other Board members making that  
25 predetermination?

1 A No.

2 Q Do you know how you're going to vote in the Schad matter?

3 A I have no idea.

4 Q Do you have any bias against Mr. Schad or Mr. Jones?

5 A No. I don't.

6 MS. GILLILAN-GIBSON: I have no further questions,  
7 Your Honor.

8 THE COURT: Cross.

9 **CROSS EXAMINATION**

10 BY MS. HENRY:

11 Q Mr. Livingston, as the Chairman and Executive Director of  
12 the Arizona Board of Executive Clemency, are you responsible  
13 for the postings that are placed on your website?

14 A On my website?

15 Q Yes.

16 A I have assumed that responsibility, yes.

17 Q And your website posts calendars?

18 A It does.

19 Q And on today's calendar was noted an Executive Session in  
20 the Schad case?

21 A Correct.

22 Q So there was an Executive Session today at the Board  
23 regarding the Schad case?

24 A No, there was not.

25 Q It just showed it on the calendar?

1 A Correct.

2 Q Mr. Livingston, as part of your training, you are trained  
3 about the importance of the Open Meetings law; is that  
4 correct?

5 A Yes, I am.

6 Q And it's your testimony before the Court that you would  
7 not violate the Open Meetings Law; is that correct?

8 A That is correct. I would not knowingly violate it.

9 Q Mr. Livingston, since there's only -- there's been these  
10 vacancies on the Board, there has been a lot of work to do,  
11 right?

12 A A tremendous amount of work to do, yes.

13 Q And there were some times when there were only three  
14 members present in the recent past to hear certain  
15 individual's request for paroles and commutations; is that  
16 correct?

17 A That is correct.

18 Q And there were times when people were coming before the  
19 Board who required a total of three votes in order to get the  
20 relief in which they sought?

21 A It takes a majority decision of the appointed members to  
22 get relief in some cases; that's correct.

23 Q And in some of those cases, because of your new duties as  
24 Chairman of the Board, you had to leave the hearings and left  
25 Ms. Kirschbaum and Mr. LaSota to hear the rest of the



1 hearings; is that correct?

2 A That has occurred, yes.

3 Q And Mr. -- Mr. LaSota and Ms. Kirschbaum would vote in  
4 public, correct?

5 A Correct.

6 Q After those hearings were over, you received requests from  
7 the public that your vote be in open meeting; isn't that  
8 correct?

9 A That is correct.

10 Q And you did not honor that request but voted in secret?

11 A That is correct.

12 Q In your affidavit you swore that Ms. Kirschbaum and  
13 Mr. Thomas both told you that the former members of the  
14 Board -- let me get it correct -- felt they were not being  
15 reappointed to a Board position because of how they voted in  
16 the past?

17 A That is what both of those individuals told me was the  
18 reasons, correct.

19 Q Did you send an e-mail to the Board about the Stay of  
20 Execution in Mr. Schad's case back in late February, March?

21 A I believe I sent an e-mail, but I can't tell you the  
22 contents off the top of my head.

23 MS. HENRY: Thank you. One moment, please.

24 BY MS. HENRY:

25 Q Mr. Livingston, Ms. Harris, the new member of the Board,

1 has she obtained her statutorily-required training in order to  
2 sit at Mr. Schad's hearing tomorrow?

3 A No, ma'am.

4 Q Will Ms. Harris be participating in Mr. Schad's hearing  
5 tomorrow should it go forward?

6 A She will be as a person who is running the recording  
7 device for tomorrow's hearing, but she will not actively  
8 participate.

9 Q And she will not vote?

10 A She will not vote.

11 MS. HENRY: Thank you.

12 THE COURT: Redirect.

13 MS. GILLILAN-GIBSON: If I could just have a moment?

14 I have no further questions, Your Honor.

15 THE COURT: All right. You may step down.

16 Your next witness.

17 MS. GILLILAN-GIBSON: I have no further witnesses,  
18 Your Honor.

19 **DEFENSE RESTS**

20 THE COURT: Redirect or rebuttal?

21 MS. HENRY: None, Your Honor.

22 THE COURT: All right. Let's hear argument.

23 MS. HENRY: Your Honor, as I understand the standard  
24 for a motion for a TRO, the standard is that we must raise  
25 serious questions.

1           There is a balancing test under the Ninth Circuit  
2 case law where the Court can balance all of the four factors  
3 that you have to take into consideration. And when the harm  
4 is great, that can weigh more heavily in the Court's balancing  
5 of the factors.

6           What we believe we have shown here is enough evidence  
7 to warrant us moving further in the process in order to  
8 conduct discovery and provide this Court with full testimony  
9 and evidence in support --

10          THE COURT: Outline the discovery you're looking for  
11 other than the letter.

12          MS. HENRY: Other than the letter I'm looking for,  
13 Your Honor, I would seek to conduct discovery by taking the  
14 deposition of Mr. Scott Smith, the Chief, the Governor's  
15 Deputy, and the defendant.

16          I would seek --

17          THE COURT: And assuming he says what you propose  
18 that he did say, how is that going to help?

19          MS. HENRY: The way that helps, Your Honor, is that  
20 establishes official interference on the part of the Governor  
21 with an independent board.

22          The defendants have stated in their brief today that  
23 the Governor -- that the case law in the Ninth Circuit is that  
24 a Governor can have a policy of never granting clemency.  
25 That's a separate issue.

1           The issue is is someone -- and I don't know if the  
2 Governor is acting on her own behalf or if someone is acting  
3 as her agent. These individuals are sued in their official  
4 capacity.

5           If the Governor's agents are engaging in  
6 behind-the-scenes arm twisting -- you won't get your job back  
7 if you don't do what I want. Or if you don't do what I want,  
8 I will destroy your professional reputation and you'll never  
9 get another job -- if that's what's going on here, in order to  
10 make sure that for the public it appears that the Clemency  
11 Board doesn't believe these individuals are worthy of the  
12 Governor's favor so that the controversial case never gets on  
13 her desk, that is a violation of minimal due process. That is  
14 a violation of *Woodard*.

15           It's the sort of arbitrary interference with the  
16 right to access the clemency proceeding that is at issue here.  
17 And we believe that a limited TRO with discovery, limited  
18 depositions, the Court can put time limits on those  
19 depositions, the Court can certainly limit the document  
20 request that I sent to the parties today.

21           THE COURT: So if he admits -- if he admits it, you  
22 think that you have established as a matter of law that there  
23 has been interference with this Board that now exists?

24           MS. HENRY: Yes, I do.

25           THE COURT: And why is that since this Board that now

1 exists never had any contact with him?

2 MS. HENRY: The Board that now exists does have  
3 contact with him.

4 THE COURT: No. Did not have contact with him.

5 MS. HENRY: Each of them were interviewed by him.

6 THE COURT: But none of them were threatened.

7 MS. HENRY: In Executive Session, so I didn't ask  
8 about their Executive Session interviews.

9 We don't know at this moment without conducting  
10 further --

11 THE COURT: Well, okay.

12 Are you suggesting that an Executive Session, when  
13 every one of these individuals said that they were not  
14 threatened by anyone at any time in Executive Session, they're  
15 going to change their position? That they have been lying  
16 under oath here?

17 MS. HENRY: Your Honor, what I'm saying is we have a  
18 fact dispute at a preliminary stage. They're saying their  
19 self-serving statements that they can be fair.

20 THE COURT: Well, self-serving under oath by these  
21 individuals? Are you saying that that -- are you asking me to  
22 merely, because let's say --

23 Well, do you expect that Mr. Scott Smith is going to  
24 say that he told them and that he threatened them?

25 Is that what -- where is the evidence that he's going

1 to say that?

2 MS. HENRY: Your Honor, your order directed  
3 defendants to dispute any facts by 9:00 a.m. yesterday.

4 THE COURT: That's true.

5 MS. HENRY: By 9:00 a.m. yesterday, Scott Smith had  
6 not denied that he had threatened from the behavior  
7 Ms. Wilkens in her interview.

8 THE COURT: But we're talking about the Board that we  
9 have now.

10 MS. HENRY: I'm talking about a pattern of conduct on  
11 behalf of Mr. Smith.

12 THE COURT: Okay. You already have the statements of  
13 the Board members, the previous Board members, and it's quite  
14 clear what their position is as to whether or not they were  
15 threatened, whether or not they were removed because they  
16 voted a certain way.

17 But all the Board members who have now testified have  
18 said they would vote their conscience and they have not been  
19 threatened.

20 MS. HENRY: I understand.

21 THE COURT: So what are you asking for now in terms  
22 of discovery?

23 MS. HENRY: I am asking for the e-mails, the  
24 communication that went out to the Board members from  
25 Mr. Hernandez, from Mr. Belcher. I'm asking for --



1 THE COURT: Okay. Let's go back. What e-mails?

2 MS. HENRY: Your Honor, I think it's a pretty typical  
3 document request to ask for e-mails that go between the  
4 parties.

5 THE COURT: No. No. No. Ask for e-mails -- I'm not  
6 going to allow a fishing expedition. Under the rules you  
7 can't get a fishing expedition, particularly on a TRO.

8 I mean, you can't -- even if we were at the stage  
9 where we're having a Rule 16 conference, I wouldn't allow it  
10 then. So what evidence do we have now that I can open the  
11 door and allow you for -- to obtain any e-mails, any  
12 possibility of e-mails ever that existed between anyone when  
13 we have unequivocal testimony under oath by these witnesses  
14 that are part of the Board now that they have never been  
15 intimidated?

16 MS. HENRY: Your Honor, what we have from the  
17 evidence --

18 THE COURT: No. The present Board. What do we have?  
19 All right. So is that accurate? Have I  
20 misunderstood something?

21 MS. HENRY: It's our theory that the Governor,  
22 through his -- through her staff, has communicated to these  
23 Board members --

24 THE COURT: These present Board members?

25 MS. HENRY: These present Board members.

1 THE COURT: What evidence do you have of that?

2 MS. HENRY: The evidence of that came in the  
3 declaration that was not challenged of Mr. Thomas and his  
4 testimony here.

5 THE COURT: No. It was challenged.

6 MS. HENRY: Mr. Thomas?

7 THE COURT: It was challenged in what way?

8 It was challenged because basically on direct  
9 examination you got everything out of him you could. On  
10 cross-examination they basically reestablished precisely what  
11 came out on direct examination.

12 He couldn't say anything more than there was a -- you  
13 know, something that somebody implied something. They showed  
14 him something on a document. He couldn't see what the  
15 document was. And the person said, well, this was a threat.

16 It's so obscure. It's absolutely obtuse. It's  
17 tenuous.

18 MS. HENRY: Your Honor, I'm just going to have to  
19 respectfully disagree with you. I think the evidence shows  
20 that the Governor's staff has actively sought to undermine and  
21 frustrate access to clemency on behalf of high-profile inmates  
22 such as Mr. Schad.

23 I believe that the testimony that Mr. Thomas was  
24 shown this letter, e-mail, whatever it is that we can't get  
25 our hands on but want desperately -- and I understand the

1 Court has ordered that it be provided -- that that letter was  
2 shown to him as an object lesson. This will happen to you  
3 too.

4 He was told by Ms. Kirschbaum and -- I'm losing my  
5 mind now. Mr. Thomas was told by Ms. Kirschbaum and  
6 Mr. Livingston -- I'm sorry. Mr. Thomas was told by  
7 Ms. Kirschbaum that the other Board members --

8 THE COURT: Mr. Thomas what?

9 MS. HENRY: That the other Board members had lost  
10 their jobs.

11 THE COURT: That's true.

12 MS. HENRY: Mr. Livingston was told that the other  
13 members had lost their jobs because of their votes.

14 The evidence shows the Flibotte case that Scott Smith  
15 got so up in Ms. Wilkens' face on, wagging his finger angrily,  
16 a man that she had known for 25 years, a woman who, you know,  
17 served the Board honorably, one vote, she's gone, and two  
18 months later, so is everybody else that they can get rid of  
19 without getting Mr. LaSota to bring a First Amendment lawsuit.

20 THE COURT: Okay. Okay. I am giving as much credit  
21 to the former Board members' testimony as credible as I am  
22 giving credit to the present Board members' testimony.

23 But if your reliance -- and as I said the best case  
24 you have is the Eighth Circuit Judge Arnold's case is the best  
25 case you have really from getting you to a minimal procedural

1 violation -- in that case it was an individual who was  
2 threatened who was going to provide testimony in an actual  
3 clemency case.

4 At this point we don't have that.

5 MS. HENRY: We have --

6 THE COURT: Assuming all the facts in your favor, as  
7 I will on essentially a motion to dismiss or a motion which is  
8 essentially a Rule 50 motion, assuming all those facts in your  
9 favor, we still don't have a connection.

10 Everything is obscure. We don't have a connection  
11 with the Board. Every one of the Board members said they're  
12 going to be fair. As a matter of fact, one of them said, you  
13 know, if they -- if I was told to vote one way, I would vote  
14 the other. So they're all voting their conscience. So  
15 where --

16 MS. HENRY: That Board member also said that he never  
17 violates the Open Meetings law and then admitted two minutes  
18 later that he did violate the Open Meetings law.

19 THE COURT: I'm sorry? Say that again.

20 MS. HENRY: Mr. Livingston's testimony was that he  
21 actually has violated the Open Meetings law because he has  
22 been voting in secret on cases when members of the public have  
23 asked him to vote public.

24 THE COURT: So where are you going? You're going a  
25 different direction now.

1 MS. HENRY: Well, I'm going with the credibility of  
2 the witnesses at this stage, Your Honor, where you're saying  
3 that you are going to presume the facts in the light most  
4 favorable to us.

5 But that doesn't presume the facts in the light --

6 THE COURT: He admitted it though.

7 MS. HENRY: He did. He admitted that.

8 And what I want to be able to do is not in a TRO  
9 hearing, but I think there is enough here under the TRO  
10 standard -- I'm not asking for a yearlong delay. I'm asking  
11 for enough time in order to get the documents.

12 Let me get the letter first. And then I can, you  
13 know, have some discovery requests that are more tailored.

14 The local Federal Public Defender's Office here,  
15 Mr. Jones' counsel, did public records requests to the  
16 Governor and they have been stonewalled.

17 They have been coming in in dribs and drabs and they  
18 have not responded within the five days they're required by  
19 statute.

20 I need the subpoena power of the Court in order to  
21 get the letter, to find out the communications, to take  
22 Mr. Smith's deposition, and find out exactly who he has talked  
23 to and what he said.

24 I can't prove all that here today in a TRO motion  
25 with an execution in a week and Ninth Circuit briefing going

1 on, but we have done the best we can.

2 And I believe we have made a prima facie case that  
3 there are serious questions, which is the standard, that  
4 members of the Governor's staff are interfering with the  
5 access to clemency. And just those efforts, even if these  
6 people say that they can be fair, that's not enough, you know,  
7 to defeat our complaint. Because other complaint goes to the  
8 official interference. There's a claim under 1985 about  
9 conspiracy to interfere with right to -- for equal protection  
10 claims. Claims --

11 THE COURT: So what you're really asking me is to  
12 make a finding that when they say they can't be fair, that  
13 they're not stating that in good conscience under oath?

14 MS. HENRY: I'm not asking you to make that finding,  
15 Your Honor. I'm asking you to make a finding that there is a  
16 dispute of facts amongst the parties that warrants further  
17 limited discovery and a TRO.

18 I'm not asking for permanent injunction right now.

19 THE COURT: But they are being repetitive. You would  
20 have to establish for me that there was a case, some case that  
21 all of the now-existing Board members, when they said that  
22 they are going to be fair, they're going to review all the  
23 documents that are presented to them, that they are not  
24 telling the truth, and that they are adversely influenced --  
25 they have been adversely influenced and would be by anything



1 that came from the Governor.

2 MS. HENRY: I disagree that that's the standard that  
3 we have to prove today. I think that's the standard we have  
4 to prove on Count 1 of the Complaint at a permanent injunction  
5 hearing.

6 Count 3 of the Complaint has to do with the  
7 conspiracy on the part of Mr. Smith and other members of the  
8 Governor's staff acting on her behalf to attempt to influence  
9 these members.

10 That in and of itself does not require the members to  
11 actually be influenced. We have testimony that  
12 Mr. Hernandez --

13 THE COURT: All right. You have to have minimal due  
14 process violations. And I think -- let's see what we've got  
15 here -- flipped a coin. That is, that the Clemency Board  
16 flipped a coin, not the Governor flipped a coin.

17 MS. HENRY: The next clause --

18 THE COURT: They have to be minimal procedural  
19 violation requirements.

20 MS. HENRY: The next clause of that sentence, Your  
21 Honor, is "or some other arbitrary factor" which has been  
22 interpreted in other cases as, for example, political reasons,  
23 political animus, or pecuniary.

24 THE COURT: It still has to affect the Board.

25 And so let's assume the Governor, taking everything,

1 all inferences in your favor, the government through the agent  
2 did something improper. And in engaging in the conduct that  
3 Mr. Scott may or may not have done, based upon the testimony  
4 of the former Board members, they felt he did, which has  
5 adversely influenced them or tell them you're not going to be  
6 reappointed because we don't like the way you handled this.

7 If that had been brought to my attention or any  
8 judge's attention at the time when they were about to vote, it  
9 would be a different case, but we have a new Board.

10 MS. HENRY: It's not a new Board. Two of those  
11 members -- three of those members were on that Board that  
12 heard that threat. It got back to them. That's our testimony  
13 that Mr. Smith communicated through Jesse Hernandez --

14 THE COURT: Okay. I understand.

15 MS. HENRY: Your Honor, it would be our position that  
16 if the Court finds that there was -- that Mr. Smith did all  
17 the things that we've said he did in our affidavits that he  
18 has not denied to date, that that establishes a case of the  
19 Governor's Office attempting to exert influence over an  
20 independent Board.

21 And that, in and of itself, is a sufficient violation  
22 of *Woodard* in order to justify this Court allowing the case to  
23 move further under a TRO or a preliminary injunction to put us  
24 on an expedited schedule for discovery.

25 And we certainly would request that the Court delay

1 tomorrow morning's 9:00 a.m. clemency hearing in Florence,  
2 Arizona, to give us sufficient time to get the letter that the  
3 Court has ordered being produced and to allow us to further  
4 brief the case for the Court should it be necessary.

5 THE COURT: Thank you.

6 MS. HENRY: Thank you.

7 MS. GILLILAN-GIBSON: Your Honor, is there a  
8 particular area you want me to address? I know it's late and  
9 I don't want to go on and on. If you have a specific question  
10 for me.

11 THE COURT: Everything is important.

12 MS. GILLILAN-GIBSON: First of all, Your Honor, I  
13 think a couple factual distinctions.

14 There was absolutely no evidence that the current  
15 Board member was threatened or threatened through three  
16 people.

17 I think Ms. Henry's misconstruing the evidence that  
18 was presented which was Ms. Kirschbaum did say the other  
19 members -- the prior members, excuse me -- felt that they had  
20 lost their job because they had voted.

21 A TRO is a very drastic measure and it's not  
22 something the Court just should grant to give them more time.  
23 And that's essentially what she's asking for. She  
24 acknowledged in her statement: I can't prove it today.

25 Exactly. She can't meet her burden of proof. She

1 has to show that there's a likelihood to prevail on the  
2 merits.

3 You have the three current Board members, a former  
4 Attorney General, testify under oath that they have not been  
5 threatened, that they have not been told how to vote, that  
6 they are fair and unbiased, and that can do the clemency  
7 hearing.

8 Under the case law they are presumed to have  
9 integrity as officers, especially when no evidence has  
10 contradicted them.

11 I mean, Mr. Thomas didn't say they wouldn't vote  
12 their conscience. All he said was something about a vague  
13 letter.

14 Mr. Belcher didn't say the current Board member was  
15 threatened and going to vote.

16 They all talked about what happened to them in their  
17 own perceptions. Let's assume that's true. I mean, we're  
18 denying that's true, but let's assume for purposes of this  
19 case it's true. That doesn't impact Mr. Schad's clemency  
20 hearing because you have three Board members who say I take my  
21 job seriously, I'm not biased, I don't care, I'm going to vote  
22 my conscience.

23 And I think if you look at the case we gave you,  
24 which is *Parker v. State Board of Pardons and Paroles*, in that  
25 case the Board Chairman came out and said no one is going to

1 be granted clemency while I'm chairman. And then three years  
2 later someone challenged him.

3 And the Court said as long as here and now you can  
4 tell me you can be fair and unbiased -- you know, fair and  
5 impartial -- there's no violation of due process.

6 We're not even that extreme in this case. It's  
7 uncontroverted testimony from these three Board Members that  
8 they are fair and unbiased. And just because there's an  
9 allegation at what happened a couple years ago or with other  
10 prior Board members, it doesn't meet the level for the TRO.  
11 The TRO should go forward tomorrow.

12 You should also note -- and I disagree with her  
13 statement that Mr. Smith didn't deny anything -- your order  
14 was to submit what affidavits we plan to rely on for the  
15 hearing and that is what we did.

16 Ms. Henry had an opportunity to call Mr. Smith today.  
17 It's her burden to prove it. She could have had him and asked  
18 all the questions that she supposedly is now saving for a  
19 deposition.

20 I e-mailed her. I said Mr. Smith is available. And  
21 she chose not to do it.

22 So that should not be a ground to continue this when  
23 today was the opportunity for her to present her testimony.  
24 Her claim is that Mr. Smith will prove the case. She didn't  
25 call Mr. Smith. That was her choice.

1 But you, as a judicial officer, when you have three  
2 public officials, appointed members, who all swore under oath,  
3 also swore in their affidavits, that they are fair and  
4 impartial, they have no bias to Mr. Schad, and there is no  
5 evidence to the contrary, Ms. Henry has not proved a reason  
6 for the TRO.

7 And we would ask that you deny the TRO and that you  
8 let the clemency hearing go forward tomorrow, Your Honor.

9 THE COURT: Thank you.

10 MS. HENRY: Your Honor has her scheduling order, I'm  
11 certain. The scheduling order split up hearing from  
12 affidavits.

13 The scheduling order could not be more clear that if  
14 the defendants disputed any fact, they were to provide  
15 affidavits by 9:00 a.m. Monday morning.

16 One presumed -- I certainly presumed -- that the  
17 reason for that was because if the Court didn't need to have a  
18 hearing because there were no disputed facts, the Court could  
19 then cancel the hearing and decide the case on the papers.

20 And so the Court's order did not, absolutely did not,  
21 limit the defendant's obligation to dispute facts by 9:00 a.m.  
22 Monday morning through affidavits. And that's certainly what  
23 I relied on in presenting our case today, as well as the  
24 Court's later statements in the hearing.

25 THE COURT: Well, you're saying that's the reason why



1 you didn't call Mr. Scott?

2 MS. HENRY: Mr. Smith? Yes, ma'am.

3 THE COURT: I mean Mr. Smith?

4 MS. HENRY: Yes. They haven't disputed those facts.  
5 And I have repeated that fact a couple of times in pleadings  
6 with this Court that's not been denied. So that's what I  
7 relied on.

8 The rest, Your Honor, I will rest on the brief and  
9 legal argument.

10 THE COURT: Thank you. All right. The matter is  
11 taken under advisement and we are adjourned.

12 And thank you, counsel, for being so patient.

13 All right. Have a nice evening.

14 (Proceedings adjourned at 7:10 p.m.)

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C E R T I F I C A T E

I, ELIZABETH A. LEMKE, do hereby certify that I am  
duly appointed and qualified to act as Official Court Reporter  
for the United States District Court for the District of  
Arizona.

I FURTHER CERTIFY that the foregoing pages constitute  
a full, true, and accurate transcript of all of that portion  
of the proceedings contained herein, had in the above-entitled  
cause on the date specified therein, and that said transcript  
was prepared under my direction and control.

DATED at Phoenix, Arizona, this 2nd day of October,  
2013.

s/Elizabeth A. Lemke  
ELIZABETH A. LEMKE, RDR, CRR, CPE



1 notice containing the information above to the Clerk's office in an envelope addressed to the  
2 Court.

3 Finally, Defendants moved to quash two subpoenas. The motion will be granted and  
4 the two existing subpoenas will be quashed. The Court notes that Federal Rule of Civil  
5 Procedure 26(d) prohibits a party from seeking discovery prior to the parties' Rule 26(f)  
6 conference, except when authorized by court order. If Mr. Thomas is able to provide  
7 sufficient identifying information for Plaintiffs to issue a specific subpoena seeking that  
8 letter, Plaintiffs have leave of Court to issue such a subpoena.

9 Accordingly,

10 **IT IS ORDERED** the Motion for Temporary Restraining Order (**Doc. 6**) is **DENIED**.

11 **IT IS FURTHER ORDERED** Defendants' Oral Motion to Deny Motion for  
12 Temporary Restraining Order (**Doc. 19**) is **DENIED AS MOOT**.

13 **IT IS FURTHER ORDERED** no later than October 3, 2013, Melvin Thomas shall  
14 file notice with the Court containing either a) the name of the individual who allowed him  
15 to view the letter or b) the reasons the individual wishes to remain anonymous.

16 **IT IS FURTHER ORDERED** the Motion to Quash (**Doc. 14**) is **GRANTED**.

17 DATED this 1<sup>st</sup> day of October, 2013.

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Roslyn O. Silver  
Senior United States District Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

EDWARD HAROLD SCHAD, JR.,

Plaintiff,

vs.

JANICE K. BREWER,  
Governor Of The State Of Arizona, In  
Her Official Capacity,

SCOTT SMITH,  
Chief Of Staff To Governor Brewer,  
In His Official Capacity

BRIAN LIVINGSTON,  
Chairman and Executive Director,  
Arizona Board of Executive Clemency

JOHN "JACK" LASOTA,  
Member, Arizona Board of Executive  
Clemency, In His Official Capacity

ELLEN KIRSCHBAUM,  
Member, Arizona Board of Executive  
Clemency, In Her Official Capacity

DONNA HARRIS,  
Member, Arizona Board of Executive  
Clemency, In Her Official Capacity

Defendants.

No. 2:13-cv-01962-ROS

NOTICE OF APPEAL

DEATH PENALTY CASE -  
EXECUTION SET FOR  
OCTOBER 9, 2013 10:00 AM

Denise Young, Esq.  
Arizona Bar No. 007146  
2930 North Santa Rosa Place  
Tucson, AZ 85712  
Telephone: (520) 322-5344  
Dyoung3@mindspring.com

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kelley\_henry@fd.org

Counsel for Petitioner Schad



COMES NOW, Edward Schad, by counsel, and notices his appeal from this Court's October 1, 2013 order. (Dkt. 21)

Respectfully submitted this 1<sup>st</sup> day of October, 2013.

Kelley J. Henry  
Supervisory Asst. Federal Public Defender  
Denise Young, Esq.

By s/Kelley J. Henry  
Counsel for Plaintiff Edward Schad

### **Certificate of Service**

I hereby certify that on October 1, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona. I also certify that I emailed a copy of the same to counsel, Kelly Gibson and Brian Luse. I further certify that I emailed copies to Ms. Kristine Fox, Capital Case Staff Attorney for the District of Arizona and Ms. Margaret Epler, Capital Case Staff Attorney for the Sixth Circuit.

*Kelley J Henry*

Counsel for Edward Schad

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1 longer order would issue. This is that longer order.

## 2 BACKGROUND

3 In 1985, a jury convicted Schad of first-degree murder for the 1978 strangling of 74-  
4 year-old Lorimer Grove. The trial court sentenced him to death. Details of the crime are set  
5 forth in *State v. Schad*, 788 P.2d 1162 (1989), and *State v. Schad*, 633 P.2d 366 (1981).  
6 Following unsuccessful state post-conviction-relief proceedings, Schad filed a petition for  
7 a writ of habeas corpus. This Court denied relief in September 2006, and the Court of  
8 Appeals for the Ninth Circuit ultimately affirmed. *Schad v. Ryan*, 671 F.3d 708 (9th Cir.  
9 2011) (per curiam).

10 After denial of certiorari, the Arizona Supreme Court issued a warrant setting Schad's  
11 execution for March 6, 2013. The Board then scheduled a reprieve/commutation hearing for  
12 February 27, 2013. Schad asked to attend the hearing and submitted materials in support of  
13 his request for commutation. (Doc. 1, Ex. C.) On February 26, 2013, instead of issuing its  
14 mandate, the Ninth Circuit granted Schad's request for a remand to this Court for further  
15 habeas corpus proceedings. *Schad v. Ryan*, No. 07-99005, 2013 WL 791610, \*3 (9th Cir.  
16 Feb. 26, 2013). The Board thereafter cancelled Schad's hearing, and the warrant of  
17 execution expired.

18 In June 2013, the United States Supreme Court vacated the Ninth Circuit's remand  
19 order. *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam). Subsequently, the Arizona  
20 Supreme Court issued a new warrant setting Schad's execution for October 9, 2013, and the  
21 Board rescheduled Schad's commutation hearing to October 2, 2013. (Doc. 1, Ex. D.)

22 On September 23, 2013, Schad's federal habeas counsel wrote to each of the four  
23 current members of the Board—Brian Livingston, John “Jack” LaSota, Ellen Kirschbaum,  
24 and Donna Harris—and asked that they recuse themselves from the October 2  
25 reprieve/commutation hearing. The letter stated that a witness had indicated to Schad's  
26 counsel that Livingston and Kirschbaum, “and possibly others, engaged in an informal  
27 conversation wherein each specifically opined that he or she would never recommend  
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1 clemency for Mr. Schad and expressed concern about what the Governor might think of such  
2 a recommendation.” (Doc. 1, Ex. A.) The letter “alleged that this conversation took place  
3 shortly after the previous hearing for Mr. Schad was cancelled either in late February or early  
4 March, 2013.” (*Id.*) The letter further stated that because Harris had only recently been  
5 appointed to the Board, she “cannot comply with the training requirements necessary to sit  
6 as a voting member” at Plaintiff’s impending hearing. (*Id.*) Finally, the letter alleged that  
7 the Governor’s office “has in the past sent letters addressed to Board Members expressing  
8 displeasure with certain board members[’] votes in favor of clemency” and that certain  
9 members “have been summoned to meetings with members of the Governor’s staff to express  
10 displeasure” with their votes. (*Id.*) Schad’s counsel requested that each Board member  
11 respond in writing by close of business, Wednesday, September 25, 2013.

12 On September 26, 2013, Schad initiated this action by filing a civil rights complaint  
13 under 28 U.S.C. § 1983. In his three-count complaint, Schad sues the following Defendants:  
14 Arizona Governor Janice K. Brewer; Scott Smith, Chief of Staff to Governor Brewer; Brian  
15 Livingston, Chairman and Executive Director of the Arizona Board of Executive Clemency;  
16 and John LaSota, Ellen Kirschbaum, and Donna Harris, members of the Board. In Count  
17 One, Schad alleges Defendants have a created a clemency process that is arbitrary and  
18 capricious, in violation of the Eighth and Fourteenth Amendments. In Count Two, Schad  
19 alleges Defendants’ failure to comply with Arizona’s open meetings law violated his rights  
20 under the Eighth and Fourteenth Amendments. In Count III, Schad alleges Defendants  
21 conspired to deprive “high-profile inmates” access to executive clemency, in violation of the  
22 equal protection clause of the Fourteenth Amendment and, for death row inmates, the Eighth  
23 Amendment. In the Prayer for Relief, Schad seeks a declaratory judgment and temporary,  
24 preliminary, and permanent injunctive relief.

25 Schad attached numerous documents to his complaint, including written declarations  
26 from five former Board members. In opposing the motion for temporary restraining order,  
27 Defendants submitted numerous declarations from past and current Board members. Those  
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1 submissions are summarized as follows.

2 Duane Belcher served on the Board for twenty years and was its Chairman and  
3 Executive Directive until replaced in April 2012 after his application for reappointment was  
4 denied. In his declaration, Belcher describes a meeting in early 2012 with two members of  
5 the Governor's staff, including Defendant Smith, during which he was questioned about the  
6 board's vote to recommend clemency in two "high-profile" cases—those of William  
7 Macumber and Robert Flibotte, whose clemency applications were ultimately denied by  
8 Governor Brewer. (Doc. 1, Ex. E.) "It was [his] opinion that the Governor's office wanted  
9 Board Members who would vote the wishes of her office, rather than vote their conscience,  
10 based on the facts and circumstances of each case." (*Id.*)

11 Ellen Stenson served on the Board for five years until she too was replaced in April  
12 2012 after her application for reappointment was denied. According to Stenson's  
13 declaration, during her 2012 interview for reappointment, Defendant Smith asked whether  
14 she stood by the Board's 2009 unanimous vote to recommend clemency for Macumber.<sup>1</sup>  
15 (Doc. 1, Ex. F.) She answered affirmatively and believes her 2009 vote "in combination with  
16 my interview response that I did not regret my 2009 vote and my indication that I would  
17 likely vote the same way, if given the chance, influenced the Governor's decision to oust me  
18 from the Board." (*Id.*)

19 Marilyn Wilkens served on the Board for approximately two years and was the third  
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23 <sup>1</sup> Stenson states in her declaration that in 2009 Macumber had been incarcerated for  
24 murder for over thirty years and presented to the Board "substantial" evidence of innocence.  
25 (Doc. 1, Ex. F.) She claims that Governor Brewer's rejection of his clemency application  
26 "made national news" and "generated significant criticism." (*Id.*) Stenson further states that  
27 she was unable to attend a 2012 Board meeting to consider a new application from  
28 Macumber and that the 2012 vote was split 2-2 (Duane Belcher and Jack LaSota in favor, and  
Ellen Kirschbaum and Marilyn Wilkens against). (*Id.*) Therefore, Macumber's 2012  
application did not advance to the Governor. (*Id.*)



1 member replaced in April 2012.<sup>2</sup> In her declaration, Wilkens asserts that, during her 2012  
2 interview for reappointment, Defendant Smith expressed dissatisfaction with her vote to  
3 reduce the sentence of Flibotte, a 74-year-old first-time offender who had been sentenced to  
4 prison for ninety years for possession of child pornography. (Doc. 1, Ex. G.) According to  
5 Wilkens, Defendant Smith became “agitated” and told her in a raised voice that she had  
6 “voted to let a ‘sex offender’ go.” (*Id.*) Wilkens concludes that she was not reappointed  
7 because “the Governor’s office does not want to receive clemency recommendations from  
8 Board members in high-profile cases.” (*Id.*)

9       Melvin Thomas was appointed to the Board in April 2012 and resigned on August 5,  
10 2013. Thomas asserts in his declaration that he was aware that “the three Board members  
11 who left before me were forced out because each one of them had recommended clemency  
12 in one or more cases that got sent up to Governor Brewer.” (Doc. 1 at H.) He claims that  
13 he once saw a letter from the Governor’s office to an unnamed Board member relaying the  
14 Governor’s displeasure about a Board vote. (*Id.*) Thomas further claims that Jesse  
15 Hernandez, who replaced Belcher as Board Chairman in April 2012, informed Board  
16 members on more than one occasion that Governor Brewer either had been unhappy with a  
17 vote or would be unhappy if the Board voted a certain way in an upcoming case, and that  
18 Hernandez got this information from the Governor’s office. Nonetheless, Thomas asserts  
19 that all of his votes while serving on the Board were dictated by his conscience and that he  
20 was unconcerned about losing his job as a result of how he voted. (*Id.*)

21       Jesse Hernandez served as Board Chairman from April 2012 until his resignation on  
22 August 16, 2013. In his declaration, Hernandez claims that he learned shortly after taking  
23 office that the Board “is not independent from the Governor.” (Doc. 1, Ex. I.) “Not long  
24 after I was sworn in, I was called to the first of several ‘come to Jesus’ meetings with Scott  
25 Smith and other individuals representing Governor Brewer.” (*Id.*) According to Hernandez,  
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27       <sup>2</sup> Wilkens testified that she was appointed to the Board in 2010 to fill the remainder  
28 of an existing term for which she then sought reappointment in 2012.

1 he was lectured about the Governor's policy to be tough on crime and was told, "We don't  
2 want another Macumber or Flibotte." (*Id.*) Hernandez understood this to mean that he was  
3 expected to vote against clemency in "particular kinds of cases." (*Id.*) He further asserts that  
4 during his short time on the Board, "the other members understood clearly that they risked  
5 losing their jobs if they voted contrary to the Governor's wishes" and that current Board  
6 member Ellen Kirschbaum said, "What would the Governor think?" in response to  
7 Hernandez's remark that she was "always a no" vote. (*Id.*) Finally, Hernandez claims that  
8 after Schad received a stay of execution in early 2012, Hernandez overheard Kirschbaum,  
9 Melvin Thomas, and (current Board chairman) Brian Livingston discuss Schad's case in the  
10 break room and that "all agreed that they would not be voting for clemency in his case." (*Id.*)  
11 According to Hernandez, Kirschbaum "said something similar to what she had told me  
12 before: 'I could not put my name on that. What would the Governor think?'" (*Id.*)

13 In addition to these declarations from former Board members, Schad also attached two  
14 letters from current Board members written in response to Schad's counsel's September 23  
15 letter requesting recusal. In the first letter, John LaSota writes that he will not recuse himself  
16 and denies as untrue the allegation that he has ever received a letter from the Governor's  
17 office expressing displeasure with votes in favor of clemency. (Doc. 1, Ex. B.) He also  
18 denies ever having been "summoned" to a meeting with any member of the Governor's staff  
19 for such person to express displeasure with a Board vote. (*Id.*) And in the second letter,  
20 Ellen Kirschbaum also declines to recuse herself and states that she "has no personal bias or  
21 prejudice against Mr. Schad" and that her "decisions are based on a comprehensive review  
22 of materials presented to me as well as all the information presented at hearings." (Doc. 6,  
23 Ex. J.)

24 In response to Schad's motion for injunctive relief, Defendants proffered written  
25 declarations from Defendant Board members Kirschbaum, LaSota, and Livingston stating  
26 that they have not been told how to vote, that job security is not a consideration in their vote,  
27 that they exercise independence in voting, and that they have not discussed Schad's case or  
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1 how they intend to vote. (Doc. 9, Exs. C, D, E.) Defendants also proffered a declaration  
2 from former Board member Thomas, who, along with Livingston and Kirschbaum, deny that  
3 they ever discussed Schad's case in the Board's breakroom or elsewhere. (Doc. 9, Ex. B, C,  
4 E.) Further, Defendants have proffered a redacted state investigative report substantiating  
5 nine allegations of inappropriate and unprofessional acts by former Board Chairman  
6 Hernandez. (Doc. 9, Ex. A.)

7 At approximately 3:30 p.m. on Friday, September 27, Schad filed a motion for a  
8 temporary restraining order and/or preliminary injunction seeking to enjoin the Board from  
9 meeting on October 2. Jones thereafter intervened and joined the motion. Jones' complaint  
10 contains slightly different claims for relief but the joint request for emergency injunctive  
11 relief was premised solely on one claim shared by Schad and Jones: that Defendants had  
12 "created a clemency process that is arbitrary, capricious and effectively denies access to  
13 executive clemency for high profile Arizona inmates." (Doc. 1 at 18.) On October 1, the  
14 Court held an evidentiary hearing on this claim.

15 At the evidentiary hearing, Plaintiffs called as witnesses former Board members  
16 Belcher, Stenson, Wilkens, and Thomas. With the exception of a clarification from Thomas  
17 concerning a "letter" explained below, each confirmed that their declarations were true and  
18 accurate. In other words, the former Board members confirmed their belief that their prior  
19 votes regarding clemency were a major driving force in the decision by Governor Brewer not  
20 to reappoint them to the Board. The Court sees no reason to question this testimony and  
21 agrees that Governor Brewer's failure to reappoint certain Board members was driven, at  
22 least in part, by dissatisfaction with those members' past votes.

23 The testimony from Thomas regarding a "letter" he was shown resulted in  
24 considerable confusion. During the hearing, Thomas testified that someone showed him a  
25 portion of a letter on a cell phone or tablet, that he saw only a few sentences and did not  
26 know to whom the letter was addressed or from whom the letter was sent, and that the person  
27 who showed him the letter "implied" that it was from the Governor or her staff and that the  
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letter expressed displeasure with certain Board members for voting in favor of clemency in a particular case. On October 3, 2013, Thomas clarified that the “letter” at issue was the letter the Board had sent to the Governor regarding Flibotte. Schad chose not to call Board Chairman Hernandez or Defendant Scott Smith as witnesses.

Defendants called as witnesses Defendant Board members Livingston, Kirschbaum, and LaSota. Each reaffirmed the statements in their declarations and denied having ever been contacted by the Governor or her staff expressing displeasure concerning a Board vote or having ever been threatened to vote a certain way. Each also testified that they vote independently and that none had prejudged Plaintiffs’ clemency applications. This testimony by Livingston, Kirschbaum, and LaSota was credible. In summary, Plaintiffs did not establish: 1) the current Board members have been contacted by the Governor or her staff to express displeasure regarding a past vote; 2) the current Board members have been contacted by the Governor or her staff regarding future votes; nor 3) the current Board members have prejudged any matter.

## DISCUSSION

### **I. Standard for Temporary Restraining Order**

A temporary restraining order is “an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted). The Ninth Circuit has adopted two tests a district court must use when deciding whether to grant a temporary restraining order.<sup>3</sup> *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding District Court “made an error of law” by employing only one test when denying preliminary injunction). First, a plaintiff seeking a temporary restraining order can attempt to satisfy the four-part test adopted by the Supreme Court in *Winter v.*

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<sup>3</sup> A request for a temporary restraining order is analyzed under the same standards as a request for a preliminary injunction. *See Stuhlberg Intern. Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).

1 *Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). Under that test, a plaintiff  
 2 “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable  
 3 harm in the absence of preliminary relief, that the balance of equities tips in his favor, and  
 4 that an injunction is in the public interest.” *Id.* at 20. If a plaintiff cannot meet the *Winter*  
 5 test, he may show there are “serious questions going to the merits,” the balance of hardships  
 6 tip sharply in his favor, there is a likelihood of irreparable injury, and the injunction is in the  
 7 public interest. *Cottrell*, 632 F.3d at 1135. This latter “sliding scale approach” allows a  
 8 plaintiff to make a lesser showing of likelihood of success provided he will suffer substantial  
 9 harm in the absence of relief. *Id.* at 1133.

10 In the context of a capital case, the Supreme Court has emphasized that these  
 11 principles apply when a condemned prisoner asks a federal court to enjoin his impending  
 12 execution because “[f]iling an action that can proceed under § 1983 does not entitle the  
 13 complainant to an order staying an execution as a matter of course.” *Hill v. McDonough*, 547  
 14 U.S. 573, 583-84 (2006). Rather, “a stay of execution is an equitable remedy” and “equity  
 15 must be sensitive to the State’s strong interest in enforcing its criminal judgments without  
 16 undue interference from the federal courts.” *Id.* at 584.

## 17 **II. Likelihood of Success on the Merits or Questions Going to the Merits**

18 Plaintiffs’ motion for temporary injunctive relief centers on a claimed right to a “fair  
 19 and impartial [clemency] tribunal” and the allegation that the current members of the Board  
 20 are impermissibly motivated by personal and political interests against voting for clemency  
 21 because they fear both job loss and displeasing the Governor. (Doc. 6 at 10-13.) Plaintiffs  
 22 have not offered sufficient evidence to support their claims.

23 In Arizona, the Governor has the power to grant reprieves, commutations, and pardons  
 24 for all offenses except treason and impeachment. Ariz. Const. art. 5, § 5. This power is  
 25 limited by the Board in that “[n]o reprieve, commutation or pardon may be granted by the  
 26 governor unless it has first been recommended by the board.” A.R.S. § 31-402(A). The  
 27 Board consists of five members who are appointed by the Governor for five-year terms and  
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1 who may be removed by the Governor only for cause. A.R.S. § 31-401(A), (D), (E).

2 Capital prisoners have no constitutional right to clemency proceedings, *Herrera v.*  
3 *Collins*, 506 U.S. 390, 414 (1993), or to commutation of a sentence. *Ohio Adult Parole Auth.*  
4 *v. Woodard*, 523 U.S. 272, 280 (1998) (plurality opinion); *Connecticut Bd. of Pardons v.*  
5 *Dumschat*, 452 U.S. 458, 464 (1981). And pardon and commutation decisions are “rarely,  
6 if ever, appropriate subjects for judicial review.” *Dumschat*, 452 U.S. at 464. However, a  
7 divided Supreme Court has recognized that some procedural safeguards apply to clemency  
8 proceedings. In *Woodard*, the Court addressed a procedural due process claim involving  
9 Ohio’s clemency process. 523 U.S. at 272. Although four justices concluded that the Due  
10 Process Clause provides no constitutional safeguards as to clemency proceedings, a majority  
11 of the Court agreed that because death-sentenced prisoners retain some life interest until  
12 execution, “some *minimal* procedural safeguards apply to clemency proceedings.” *Id.* at 289  
13 (O’Connor, J., concurring). “Judicial intervention might, for example, be warranted in the  
14 face of a scheme whereby a state official flipped a coin to determine whether to grant  
15 clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency  
16 process.” *Id.*; see also *Woratzeck v. Arizona Bd. of Exec. Clemency*, 117 F.3d 400, 404 (9th  
17 Cir. 1997) (concluding that a procedural due process violation exists only if the clemency  
18 board’s procedures “shock the conscience”). Justice Stevens opined that the Due Process  
19 Clause protects against the use of procedures “infected by bribery, personal or political  
20 animosity, or the deliberate fabrication of false evidence.” 523 U.S. at 290-91 (Stevens, J.  
21 concurring in part and dissenting in part). He further opined that the Equal Protection Clause  
22 protects against the use of “race, religion, or political affiliation as a standard for granting or  
23 denying clemency.” *Id.* at 292.

24 Since *Woodard*, courts have adopted a cautious approach in determining whether the  
25 “minimal procedural safeguards” applicable to clemency under *Woodard* require that a  
26 decision maker be free of bias. For example, in *Anderson v. Davis*, a capital prisoner sought  
27 to remove the Governor of California from the clemency process by asserting that Governor  
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1 Gray Davis had an alleged “blanket policy vis à vis murderers to deny all applications of  
2 executive clemency out-of-hand without exercising any judgment on the particular case or  
3 prisoner before him.” 279 F.3d 674, 675 (9th Cir. 2002). The Ninth Court denied the  
4 prisoner’s request for injunctive relief and a stay of execution after noting that other courts  
5 “have uniformly rejected allegations that due process is violated by a governor who adopts  
6 a general policy of not granting clemency in capital cases.” *Id.* at 676. The court further  
7 observed that the prisoner had failed to present any evidence suggesting that Governor Davis  
8 was incapable of “judging a particular controversy fairly on the basis of its own  
9 circumstances,” but also clarified that it was not holding that the standards applicable to  
10 decisions of judicial officers and administrative boards apply to clemency decisions. *Id.* at  
11 676-77 & n.1.

12 Similarly, in *Parker v. State Bd. of Pardons and Paroles*, a capital prisoner  
13 unsuccessfully sought injunctive relief and a stay of execution based on alleged bias of the  
14 board, including that of its chairman, who several years prior allegedly stated: “No one on  
15 death row [will] ever get clemency as long as [I am] Chairman of the Board.” 275 F.3d  
16 1032, 1034 (11th Cir. 2001) (per curiam) (alteration in original). The Eleventh Circuit  
17 affirmed the district court’s crediting of the chairman’s testimony at a hearing that he now  
18 “has an open mind and listens to all of the clemency cases that come before him prior to  
19 voting on them.” *Id.* at 1037. The court therefore declined to decide whether a “closed  
20 mind” would amount to a violation of due process. *Id.* at 1037 n.3.

21 In *Roll v. Carnahan*, two capital prisoners seeking to enjoin their executions argued  
22 that the Governor of Missouri could not be fair and impartial when considering clemency  
23 petitions because he was running for the United States Senate and the grant of clemency in  
24 capital cases was a campaign issue. 225 F.3d 1016, 1017 (8th Cir. 2000) (per curiam). The  
25 Eighth Circuit acknowledged the minimal due process required by *Woodard*, but rejected the  
26 challenge to the governor’s objectivity because “the decision to grant or deny clemency is  
27 left to the discretion of the governor.” *Id.* at 1018.

1 Finally, in *Bacon v. Lee*, the Supreme Court of North Carolina rejected the capital  
2 prisoners' argument that the minimal due process applicable to clemency proceedings  
3 "includes the right of an inmate seeking clemency to have his or her request reviewed by an  
4 executive possessing the level of impartiality normally required of a judge presiding over an  
5 adjudicatory proceeding." 549 S.E.2d 840, 849 (2001). There, the Governor of North  
6 Carolina had previously served as Attorney General for the state throughout part, or all, of  
7 the plaintiffs' appellate and post-conviction proceedings, and was the prosecutor in one of  
8 the cases. This, plaintiffs argued, precluded the governor from fairly considering their  
9 clemency requests and rendered him unqualified to sit as a neutral and impartial decision  
10 maker. In a lengthy opinion, the court concluded that *Woodard* did not intend "to disrupt the  
11 orderly role of the executive in discharging clemency power by making his or her  
12 background or previous life experiences a justiciable controversy" under the Due Process  
13 Clause, whether alleged on an "inherent conflict of interest" theory or an "actual bias"  
14 theory. *Id.* at 851. Instead, the court found that *Woodard* required only that state clemency  
15 procedures provide notice and an opportunity to participate in the proceedings, and that "the  
16 clemency decision, though substantively a discretionary one, is not reached by means of a  
17 procedure such as a coin toss." *Id.* at 710-11, 549 S.E.2d at 850.

18 Here, Plaintiffs' complaint rests primarily on two premises: (1) that they have a right  
19 to fair and impartial decision makers on the Board, and (2) that the Defendant Board  
20 members are in fact biased because of either personal animus or fear of retribution from the  
21 Governor or her staff. Plaintiffs cite no controlling authority for the first, and the evidence  
22 of the second is lacking.

23 Plaintiffs' motion for injunctive relief cites a plethora of cases concerning the  
24 requirement of a "fair and impartial tribunal" under the Due Process Clause. However, all  
25 involve judicial or administrative decision makers; none address clemency proceedings. This  
26 Court similarly found no cases extending the concept of a "fair and impartial tribunal" to  
27 clemency proceedings. Rather, as already noted, courts have either declined to decide the  
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1 issue or found that the minimal level of process due under *Woodard* does not include the  
2 same level of neutrality as required by the Due Process Clause in other administrative and  
3 judicial proceedings. See, e.g., *Bacon*, 549 S.E.2d at 853 (holding that “clemency  
4 determinations by the Executive Branch are fundamentally different than adjudicatory  
5 proceedings within the Judicial Branch” and therefore principles of recusal developed by and  
6 for judges are inapplicable). Indeed, the Ninth Circuit has expressly declined to hold that the  
7 standards applicable to decisions of judicial officers and administrative boards apply to  
8 clemency decisions. *Anderson*, 279 F.3d at 677 n.1.

9 The only other authority relied on by Plaintiffs is equally unavailing. In *Young v.*  
10 *Hayes*, the Eighth Circuit granted a stay of execution and reinstated a capital prisoner’s  
11 § 1983 complaint alleging a violation of his right to due process in clemency. 218 F.3d 850  
12 (8th Cir. 2000). There, a supervising prosecutor had threatened to fire an employee attorney  
13 who wanted to provide information to the Governor of Missouri in support of the prisoner’s  
14 clemency application. The court found that Missouri law permitted the consideration of  
15 evidence in support of clemency from any and all sources and that the defendant supervisor  
16 had “deliberately interfered with the efforts of petitioner to present evidence to the  
17 Governor.” *Id.* at 853. Unlike in *Young*, where the government official threatened a witness  
18 and thereby impeded the prisoner’s ability to make a case for clemency, Plaintiffs here do  
19 not contend that Defendants have deliberately interfered with their efforts to present evidence  
20 in connection with their clemency applications. Rather, Plaintiffs believe that staff working  
21 for the Governor, who has the ultimate decision to grant or deny clemency, have improperly  
22 pressured Board members to vote a certain way. The evidence, however, is to the contrary.  
23 The Board members stated under oath that they have not been pressured by the Governor to  
24 vote a certain way.

25 Assuming that the minimal due process applicable to clemency proceedings pursuant  
26 to *Woodard* includes access to an impartial decision maker, Plaintiffs have not demonstrated  
27 that they lack access to a fair and impartial clemency process. Defendant Board members  
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1 Livingston, Kirschbaum, and LaSota testified at the hearing that each votes independently,  
2 that each considers only the evidence and arguments of counsel in determining how to vote,  
3 that none have had contact with the Governor's office or any kind of communication from  
4 the Governor or her staff regarding how to vote in Plaintiffs' cases, and that none had yet  
5 determined how to vote on Plaintiffs' applications. In addition, Livingston and Kirschbaum,  
6 as well as former Board member Thomas, denied having a conversation about Schad's case  
7 in the Board's breakroom or elsewhere and denied stating that they would be voting against  
8 Schad. In light of the credible and consistent testimony of Livingston, Kirschbaum, LaSota,  
9 and Thomas, the Court finds insufficient evidence that the current Board members are  
10 unwilling or incapable of being objective or maintaining an open mind when they consider  
11 clemency applications.

12 Similarly, Plaintiffs presented evidence that several former Board members believe  
13 they were not reappointed because the Governor was "unhappy" with their votes in favor of  
14 clemency. But again, even if their impressions were accurate, this does not demonstrate that  
15 the current Board members are incapable of objectivity or are biased. Livingston,  
16 Kirschbaum, and LaSota testified that job security is not a consideration in their vote, that  
17 they have received no communications from the Governor or her staff expressing displeasure  
18 with any of their clemency recommendations, that they have never been pressured to vote in  
19 a particular manner, and that each votes independently. As LaSota referenced during his  
20 testimony, Arizona law provides for dismissal of a Board member only for "cause." A.R.S.  
21 § 31-401(E). Given this standard, the Court finds no reasonable basis to conclude that "fear  
22 of dismissal" influences how the Board members vote or otherwise impacts exercise of their  
23 clemency-related duties. Nor does it find basis to conclude that fear of not being reappointed  
24 five years out means the Board members are incapable of "judging a particular controversy  
25 fairly on the basis of its own circumstances." *Anderson v. Davis*, 279 F.3d 674, 675 (9th Cir.  
26 2002). In short, on the only claim argued in their request for injunctive relief, Plaintiffs have  
27 not established they are likely to succeed or that there are serious questions going to the  
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merits.<sup>4</sup>

### III. Remaining Factors

Having failed to establish a likelihood of success or serious questions going to the merits, the remaining factors cannot be dispositive. The Court notes, however, that there is a likelihood of irreparable harm in every § 1983 action brought by a capital prisoner seeking to enjoin an impending execution. *Towery v. Brewer*, 672 F.3d 650, 661 (2012). But the State also has a “strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Hill v. McDonough*, 547 U.S. at 584. And “the victims of crime have an important interest in the timely enforcement of a sentence.” *Id.* Therefore, in addition to not satisfying the first requirement for obtaining injunctive relief, the remaining factors support the denial of injunctive relief.

Based on the foregoing,

**IT IS ORDERED** that Plaintiffs’ Motion for a Temporary Restraining Order and/or Preliminary Injunction (Doc. 6) is **DENIED**.

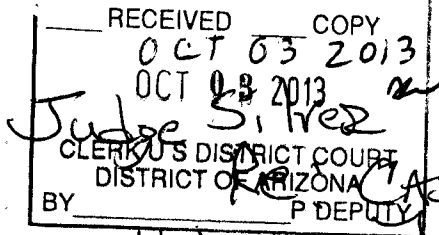
DATED this 4<sup>th</sup> day of October, 2013.



Roslyn O. Silver  
Senior United States District Judge

---

<sup>4</sup> The motion for preliminary injunctive relief does not address the likelihood of success on Claims Two and Three of Schad’s complaint.



OCT 3, 2013

Case CV-13-01962-Plx-ROS  
I Melvin Thomas Respectfully Submit A  
copy of The letter being Requested by The  
Court And The Source of The Letter.

Ms. Kirschbaum was The Source of The  
letter. I had given Ms. Kirschbaum my  
word NOT TO SHARE ANY PRIVATE  
CONVERSATION with others, unless given  
permission. Ms. Kirschbaum has since  
given me permission to disclose The  
letter she and I discussed regarding  
why she and others felt former board  
members had NOT been Re-Appointed.

Let me be clear That Ms. Kirschbaum  
only implied IT was due to The  
ATTACHED LETTER regarding INMATE F/1, b0tte,  
that the former members had NOT been  
Re-Appointed.


Ms. Kirschbaum LATER ASKED IF I  
WANTED TO SEE The letter she implied  
that might had IMPACTED The decision  
NOT TO Re-Appoint former board members.  
I declined her offer to READ A COPY OF  
SAID letter.



Apparently, I mis-interpreted her comments that the letter we were discussing WAS NOT something from the Governor's office, or to any one of the Board members.

Upon Receipt of The letter from Ms. Kirschbaum I learned The letter WAS The Board's Recommendation to The Governor's office, regarding Inmate Flibotte.

Sincerely,

  
Melvin Thomas

P.S. I believe This letter was already part of the proceeding.



29 of hundreds

**Error**

Ellen Kirschbaum - Oct 2

to melthomas1950

Mel ..I just read the letter I sent you and it is truly a draft. The recommendation was typed wrong here..we recommended a total of 5 years for all 9 counts and the tenth count to remains as life probation. My final is probably in the work computer or I can get you a final copy.

We are headed to Florence this morning. Have a wonderful day.

[Reply](#)[Reply all](#)[Archive](#)[Delete](#)[Report spam](#)[Sign out](#)[Mark as unread](#)**melthomas1950@gmail.com** | [Sign out](#)[Help](#) | [Terms of Service](#)

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February 2, 2012

The Honorable Jan Brewer

Governor of the State of Arizona

1700 West Washington, 9<sup>th</sup> Floor

Phoenix, Arizona 85007

**Re: Robert T. Flibotte ADC# 2657156**

Commutation of Sentence Application – A.R.S. 13-603(L)--Issued by The Honorable Peter Cahill-Gila County Superior Court

Gila County Cause # CR-2009-0552 & CR 2010-0630

Dear Governor Brewer:

The Arizona Board of Executive Clemency met on January 26, 2012 to consider Mr. Robert T. Flibotte's application for Commutation of Sentence. On July 28, 2011 a jury unanimously found Mr. Flibotte guilty on 10 counts of Sexual Exploitation of a Minor. Nine of the ten counts were Dangerous Crimes Against Children and on each of these counts a ten-year prison term was ordered. By law, each sentence must be served consecutively. Therefore, Mr. Flibotte must serve 90 years. On the remaining count, life time probation with sex offender terms was ordered.

All five members of the Board believe the 90 year prison term is excessive based on mitigating factors and the likelihood that Mr. Flibotte will not commit a future offense. The Board voted unanimously to recommend to you that Mr. Flibotte's sentence be commuted from the ten years consecutive on each of the nine counts to five years on each count to be served concurrently. Mr. Flibotte would serve 5 years in prison. On the remaining count, life time probation with sex offender registration will remain as previously mandated by the court.

**Statement of the Offense**

On October 5, 2009, the Payson Police Department received notification from a local computer business that a computer, in their possession and under repair, had numerous images of young girls between the ages of eight and twelve involved in various sex acts or exploitive exhibition of their genitals. The computer had been taken from the home of Mr. Robert Flibotte after the repair technician determined that the virus present in the machine would require further repair at the business' location.

The Payson Police Department viewed the images and then issued a search warrant for Mr. Flibotte's residence. At Mr. Flibotte's home, a thumb drive with multiple images of young girls engaged in exploitive exhibition or other sexual conduct were found. Also located during the search was paperwork on how to unlock encrypted files and "How to Hide Porn on Your Computer." Later, a search warrant at his place of business was issued and at that location, his computer and a number of other thumb drives were seized and sent for further analysis. Subsequently, it was found that Mr. Flibotte possessed over 26,000 images as well as a significant number of videos (500) exploiting young girls and boys. The defendant was arrested and initially charged on 15 counts. He was tried for only ten counts.

Mr. Flibotte did not testify at trial but maintained his innocence by stating he was only "surfing" for information relating to a Disney character. He claimed the pornographic images came forth and were automatically downloaded without his consent. At the time of his presentence report, the Probation Officer completing the report noted that Mr. Flibotte was still diminishing his responsibility as doing no wrong by stating he felt the intricacies of the computer and internet made him vulnerable and susceptible to malicious cyber attacks and viruses.

### **Discussion**

Mr. Flibotte is a 74 year old, Air Force Reserve veteran and retired 33 year resident of the Payson Community. The Board has identified a number of mitigating factors to consider clemency for Mr. Flibotte. Until this incident, Mr. Flibotte's criminal history record was blemish free without so much as a traffic ticket. He had established himself as a business leader and active community volunteer. Along with his partner, he is founder of the Payson Coldwell Banker Realty and served as President of the Arizona Association of Realtors in 1995. He served 16 years on the Planning and Zoning Commission of which he served 5-6 years as Chairman, volunteered his time during the political campaigns in the Town of Payson and was a member of the Rotary Club.

At the time of sentencing, Judge Cahill stated, "I will find that the sentence is required to impose today is clearly excessive. If I were to think of the murderers I've sentence to mere decades, 22 years, and compare it to the sentence I've just imposed for 90 years, it's clearly excessive." Also stated at sentencing, "Where I think the sentence is clearly excessive is at least where I'm required to impose consecutive sentences, at least there." Based on this reasoning, Judge Cahill issued a 603(L) allowing Mr. Flibotte to seek a commutation of sentence from the Governor through the Board of Executive Clemency.

Nearly 100 letters asking for probation were presented to Judge Cahill prior to his sentencing. For the clemency hearing, a number of support letters were submitted and several community leaders including a former Mayor of Payson and friends spoke highly of Mr. Flibotte. They asked Board members to consider Mr. Flibotte's past community contributions as factors in determining the recommendation to Governor Brewer. Also present were a number of family members including Mr. Flibotte's wife of 47 years and his daughter, Amy Kissling. His eldest daughter, Renee Luskow could not be present due to her residency in Germany but she provided a letter of support. Mr. Flibotte's brother, Don, came from New Hampshire to speak on behalf of his brother. All delivered a compelling plea for clemency describing Mr. Flibotte as a devout, loving and committed husband and

father. Representative Cecil Ash spoke in regards to excessive sentencing and outlined his belief as to why Mr. Flibotte's case served as a strong example for consideration. Telephonically participating at the hearing was a Gila Deputy County Attorney who opposed any form of clemency. She believed the sentence was not excessive.

On May 19, 2011, a psychological and psychosexual evaluation was conducted by Dr. Richard Lanyon, Ph.D. on Mr. Flibotte to gain a comprehensive understanding of him, including childhood, adolescence and adulthood, any childhood dysfunctions, physical or sexual abuse, psychopathology, dysfunction related to injury or illness and any other factors that could be relevant to an understanding of Mr. Flibotte in regard to the allegations made against him. Also requested was an assessment of the degree of risk that Mr. Flibotte poses to the community, and the likelihood that he could be successfully rehabilitated. The completed report noted:

"Risk assessment based on the results of three research-based and empirically constructed instruments designed to identify men who will continue to commit sex offenses in the future uniformly indicate that Mr. Flibotte's likelihood of further activity is extremely low. Combining these empirical results with clinical opinion based on his overall characteristics. I believe that Mr. Flibotte is not typical of men who have extensively viewed child pornography; and now that his difficulties have come into the open, active counseling will provide a successful outcome. Given Mr. Flibotte's long-term monogamous relationship and the fact that he has reportedly never engaged in deviant sexual activity actual children, despite many opportunities to do so, I believe it is unnecessary for him to register as a sex offender.

The Board members also note Mr. Flibotte's questionable state of health. He has undergone several surgeries to include prostate cancer removal (2007), kidney stone removal (2006) and a heart stent placement (2005). Prior to his incarceration, he was under the care of several physicians to monitor his heart, thyroid, neuropathy, check his PSA levels, and conduct other medical tests along with taking his prescribed medications: L-Thyroxin, Lyrica, Allopurinol, Arthrotec and Aspirin.

At the hearing, Mr. Flibotte was questioned about his responsibility for his actions and he acknowledged his egregious behavior and horrors of child pornography. He understands that his obsession to viewing child pornography is not a harmless, victimless crime.

### **Recommendation**

Arizona has some of the strictest child pornography laws in the U.S and for good reason which is to deter this hideous and deplorable crime. While Mr. Flibotte's convictions are serious, deplorable and certainly warrant criminal charges, there was no allegation or evidence in his past that Mr. Flibotte actually touched a child. His conviction stems from his downloading and purient viewing of the materials. Should his sentence be commuted as recommended, Mr. Flibotte will be nearly 80 years old upon release and subject to lifetime probation and sex offender registration.

Board members recognize the seriousness of Mr. Flibotte's offenses; however, we believe that the Board's recommended sentence is adequate to serve justice and protection for the community.

Respectfully yours,

Duane Belcher,

Chairperson

Ellen Kirschbaum

Board Member

Jack LaSota

Board Member

Marilyn Wilkens

Board Member

Ellen Stenson

Board Member





34 of hundreds

**Clementy Letter**

Ellen Kirschbaum - Oct 1 1 - Attachments  
to melthomas1950

Mel. Wonderful to see you today. Next time..a happy lunch!

[Reply](#)[Forward](#)[Archive](#)[Delete](#)[Report spam](#)[Add star](#)[Mark as unread](#)[melthomas1950@gmail.com](#) | [Sign out](#)[Help](#) | [Terms of Service](#)

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Counsel for Plaintiff Jones

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

EDWARD HAROLD SCHAD, JR.,  
et. al,

Plaintiff,

vs.

JANICE K. BREWER, et. al,  
Governor Of The State Of Arizona, In  
Her Official Capacity,

Defendants.

No. 2:13-cv-01962-ROS

RULE 59 MOTION TO  
RECONSIDER  
ORDER DENYING  
PRELIMINARY INJUNCTION

DEATH PENALTY CASE -  
EXECUTION SET FOR  
OCTOBER 9, 2013 10:00 AM  
OCTOBER 23, 2013 10:00 AM

Based on Melvin Thomas' October 3, 2013, submission to the Court, Doc. No. 31, Melvin Thomas either committed perjury in his testimony on October 1, 2013, or he lied to the Court in his unsworn letter on October 3.<sup>1</sup> If Thomas' latest letter is to be believed, Ellen Kirschbuam certainly misled the court, and may also have committed perjury. Both witness' testimony and credibility has certainly been called into question. Plaintiffs did not have this information at the time of the preliminary hearing, despite repeated efforts to obtain it.<sup>2</sup> This Court should withdraw its orders of October 4, Doc. No. 30, and October 1, Doc. No. 21, and issue a preliminary injunction. Alternatively, the Court should conduct further inquiry.

At the preliminary hearing, Thomas testified that an unnamed person showed him a letter that reflected Defendant Brewer's displeasure with the Board as a result of their votes in a case. Thomas testified that the unknown person did so in an effort to intimidate him: "I think they thought that I would be intimidated by it." TR Vol. 1, p. 43. Thomas testified that "the person was just trying to goad me into thinking that I would succumb to that kind of pressure." *Id.* p. 44. Thomas testified that it was implied that he could likewise suffer the same fate as three Board members who had been ousted for their vote in a particular case or cases.

---

<sup>1</sup> Despite repeated efforts to obtain a copy of Mr. Thomas' letter on October 3, Plaintiff's counsel did not receive it until October 4 at 9:19 a.m.

<sup>2</sup> Thomas refused to answer questions and was evasive. Tr. Vol. 1, at 38-44. Defendants refused to comply with subpoenas, which this Court quashed, Doc No. 21, despite Defendants' counsel's concessions that communications between the Governor, or Smith, and the Board are relevant to Plaintiffs' complaint. Tr. Vol. 1, pp 7-9.

Critically, Thomas testified that the person who showed him the letter was NOT a board member. Tr. Vol. 1, p. 40 (**The person who showed it to me was not a Board member[.]**) (emphasis supplied). Thomas now says that the person to whom he was referring is Defendant Ellen Kirschbaum, who is a current Board member. According to Thomas' testimony at the hearing, then, Defendant Kirschbaum was attempting to "goad" and "intimidate him," and implied to him that he could lose his job as a result of his votes.

Kirschbaum swore under oath that she did not know the reason that the three board members were ousted. Tr. Vol. 2, p. 91. She also swore that no one from the Governor's office ever expressed displeasure with her votes. *Id.* p. 86-87. Kirschbaum testified that she did not think her job was at risk for her votes. *Id.* p. 89. If Kirschbaum attempted to goad and intimidate Thomas and implied that he too could lose his job if he didn't fall in line, then her October 1 testimony is not credible. Plaintiffs ought to at least have an opportunity to cross examine these witnesses about these glaring inconsistencies.

Thomas' letter to Court raises even more questions. In court, under oath, Thomas went to great lengths to explain why the letter he described as seeing on a tablet type phone was "confidential" and it was shown to him in "confidence" and the person wasn't supposed to show it to him. Tr. Vol. 1, p. 43-44. Now, Thomas says that the letter he was shown was the Flibotte letter that was already in the

record in these proceedings, and more importantly, it was a public record. Doc. No. 31. If one carefully reads what Thomas submitted on October 3, the source of the submission is Kirschbaum. Kirschbaum emailed Thomas the letter after Court proceedings and then sent another email saying that what she had sent Thomas was just a draft. Doc. No. 31, pp. 3, 8. The circumstances surrounding these conversations and letter are nonsensical.

Kirschbaum proudly proclaims authorship of the Flibotte letter. *See* Tr. Vol. 2, p. 86. The Flibotte letter is a public record. It is not confidential. Anyone can get it from the Board. This begs the question: why would Thomas refuse to say who showed him the letter, who the letter was from, and who it was addressed to if the letter was public record and authored by a Board member who seems to be proud that she penned the letter? Why is it that Kirschbaum wasn't supposed to show it to him? Moreover, given the inconsistencies in Thomas' testimony and his evasiveness surrounding the letter, is his unsworn letter to the court actually what Kirschbaum showed him in an attempt to "intimidate" him? Indeed, Thomas's revelations have seriously called into question Kirschbaum's credibility.

Kirschbaum testified that she did not know if Belcher, Wilkens, and Stenson were ousted for their vote. Tr. Vol. 2, p. 91. But Thomas said that the person who showed him the letter, presumably Kirschbaum, was showing him this letter to goad and intimidate him, implying that he too could lose his job. Kirschbaum

claims to have never been contacted by the Governor and her staff with complaints about any of her votes, TR Vol. II, p. 86-87, but according to Thomas, she was.

Thomas testified, that the person, presumably Kirschbaum, was showing him the letter to give him information about what was going on. Under oath, he described the letter to the Court:

THE COURT: A letter that that Board member had received showing or indicating that the Governor was unhappy with that Board member's decision?

THE WITNESS: Not just that Board member but several Board members' decisions on a particular case, but I don't remember the case.

THE COURT: So the letter read that? Is that what the letter stated, or is that what the person said?

THE WITNESS: That's what they said. It implied that they were upset with their votes on a particular case. I don't know which case that was either.

Tr. Vol. 1, p. 41. This testimony is inconsistent with his October 3 unsworn submission. Thomas went further in explaining that the person who showed him this letter indicated that the Board member jeopardized their jobs with their votes and their "ability to be objective" was "jeopardized." *Id.* p. 45.

Reading together Thomas's declaration, testimony, and later submission to the court, as well as how those relate to Kirschbaum's testimony, it seems, at the very least that there are serious questions whether this is in fact the letter, or whether the witnesses have testified truthfully.



Even if the letter produced by Thomas, through Defendant Kirschbaum, is the letter to which he was referring, considering all of his statements together, he has told the court that the efforts to intimidate him and goad him and to influence his vote came from Defendant Kirschbaum. The Court asked, “So was it more of what the person said than what you read?” Thomas answered, “Yes, ma’am.” *Id.* p. 45. Thomas testified it was implied that he could lose his job because of the way he voted. *Id.* p. 46. Thomas also testified that former chairman Hernandez tried to pressure their votes and claimed that the pressure was coming from the Governor’s office. *Id.* p. 47.

The letter that Melvin Thomas provided to the Court on October 3, 2013, raises serious questions of perjury and impeaches the testimony of Ellen Kirschbaum. What has just transpired calls into question this Court’s credibility findings, which are the very basis of this Court’s October 1 and 4, 2013 Orders.

This Court should reconsider its October 1 and October 4 orders, grant a preliminary injunction staying Plaintiffs’ executions, and permit them to conduct expedited discovery. Alternatively, this Court should conduct further inquiry into the matters raised by the submission by Thomas.

Respectfully submitted this 4<sup>th</sup> day of October, 2013.

Kelley J. Henry  
Supervisory Asst. Federal Public Defender  
Denise Young, Esq.

By s/Kelley J. Henry  
Counsel for Plaintiff Edward Schad

### **Certificate of Service**

I hereby certify that on October 4, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona. I also certify that I emailed a copy of the same to counsel, Dale Baich, Kelly Gibson and Brian Luse. I further certify that I emailed copies to Ms. Kristine Fox, Capital Case Staff Attorney for the District of Arizona and Ms. Margaret Epler, Capital Case Staff Attorney for the Sixth Circuit.

Kelley J Henry  
Counsel for Edward Schad

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Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

<p>EDWARD HAROLD SCHAD, JR., et. al.</p> <p>Plaintiffs,</p> <p>v.</p> <p>JANICE K. BREWER, Governor Of the State of Arizona in Her Official Capacity,</p> <p>SCOTT SMITH, Chief of Staff to Governor Brewer, In His Official Capacity</p> <p>BRIAN LIVINGSTON, Chairman and Executive Director, Arizona Board of Executive Clemency</p> <p>JOHN "JACK" LASOTA, Member, Arizona Board of Executive Clemency, In his Official Capacity</p> <p>ELLEN KIRSCHBAUM, Member, Arizona Board of Executive Clemency, In Her Official Capacity</p>	<p>Case No. 2:13-cv-01962-ROS</p> <p><b>RESPONSE TO RULE 59 MOTION TO RECONSIDER ORDER DENYING PRELIMINARY INJUNCTION</b></p> <p><b>CAPITAL CASE</b></p> <p><b>EXECUTION SET FOR OCTOBER 9, 2013</b></p>
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

DONNA HARRRIS, Member, Arizona Board of Executive Clemency, In Her Official Capacity,  Defendants.	
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Defendants Governor Janice K. Brewer, Chief of Staff, Scott Smith, Chairman/Executive Director of the Arizona Board of Executive Clemency, Brian Livingston, Board Member, John “Jack” LaSota, Board Member Ellen Kirschbaum, and Board Member Donna Harris files this Response to Plaintiff’s Rule 59 Motion to Reconsider Order Denying Preliminary Injunction.

In the Ninth Circuit, a Rule 59(e) motion may be granted if: (1) the motion is necessary to correct manifest errors of law or fact upon which the appealable order is based; (2) the moving party presents newly discovered or previously unavailable evidence; (3) the motion is necessary to prevent manifest injustice; or (4) there is an intervening change of law. See *Turner v. Burlington Northern Santa Fe R. Co.*, 338 F.3d 1058, 1063 (9th Cir.2003) (citations omitted). For the reasons outlined below, Plaintiff’s motion fails the standard above. Although Plaintiff’s Motion does not state which portion of Rule 59 it is relying on, Defendants are assuming it is under Rule 59 (e). Nevertheless, Plaintiff’s Motion fails to demonstrate under any standard why this Court should revisit its decision.

Mr. Thomas’s statement filed on October 3, 2013 raises no new issues or pertinent facts and contrary to plaintiff’s position, Mr. Thomas’s nebulous testimony was not perjurious. (Dkt. No. 31) Mr. Thomas letter’s and attachment is irrelevant to the issue of whether members of the Board have not and will not give fair clemency hearings. The Board conducted Schad’s clemency hearing on October 2, 2013. Jones Clemency hearing is scheduled for October 16, 2013.

Mr. Thomas’s statement with attachments provides no additional evidence that the

current Board is biased and did not (Schad) or will not (Jones) vote independently. Plaintiffs argue that Mr. Thomas has changed his story and committed perjury. Plaintiffs provide the following quote to substantiate his position that Mr. Thomas committed perjury: “The person who showed it to me was not a Board member[.]” Motion at p. 3. Plaintiffs, however, fail to accurately quote Mr. Thomas’s testimony. Further, within context, Mr. Thomas’s testimony does not contradict his affidavit provided to this court by Plaintiffs. The full and complete testimony of Mr. Thomas is as follows:

Q. The person who showed you the letter was not a Board member; is that correct?

A. No, ma’am.

Q. That’s not correct?

A. The person who showed it to me was not a Board member, **no**. (emphasis added) TR P.39 lns 23-25 through P. 40 ln 1.

Plaintiffs conveniently omitted the remainder of Mr. Thomas’s testimony wherein he states unequivocally that the question on direct examination is not correct; that the person who showed him the letter was *not* a Board member. The question posed above is not correct. His testimony states that it was a Board member that showed him the letter. This is consistent with his affidavit wherein he states it was Board member that showed him the letter. See Complaint Ex H, Further, consistent with his testimony and his affidavit, Mr. Thomas states in his submission that the individual that showed him the letter was Ms. Kirschbaum, a current Board member.

Plaintiffs then attempts to show that Ms. Kirschbaum’s testimony is suspect and that she attempted to intimidate Mr. Thomas. Mr. Thomas’s testimony was that he wasn’t really sure why he was shown the letter and he was merely speculating to as the reason why it was shown to him. Simply, he was guessing to the reason. Regardless, Mr. Thomas is not a current Board member and even if true is irrelevant to how the current Board members would or will vote.

Nor did Ms. Kirschbaum perjure herself either. Mr. Thomas’s hazy recollection

does not contradict Ms. Kirschbaum's affidavit or her sworn testimony. Ms. Kirschbaum testified that she believed that former Board members suspected they were not reappointed because of their votes. TR 91 at lns 17-20. However, she did not testify to having actual knowledge of the reasons previous Board members were not reappointed. Ms. Kirschbaum testified that she did not believe that her votes would be a reason she would not be reappointed. TR 89 lns 23-25. Plaintiffs remaining arguments are also irrelevant and unpersuasive to the issue of the current Board members fairness.

Mr. Thomas submission does not provide any new relevant evidence or questions that the current Board has not or will not freely vote. Moreover, all the Board members, both past and present, all testified that they have always voted independently and were never told how to vote.

### CONCLUSION

This Court has already reviewed and weighed the evidence presented including Mr. Thomas's submission. This Court correctly denied the Motion for the Temporary Restraining Order. This Court should deny Plaintiff's Motion for Reconsideration.

Dated this 4<sup>th</sup> day of October, 2013.

THOMAS C. HORNE  
Attorney General

By: /s Kelly Gillian-Gibson  
Kelly Gillilan-Gibson  
Brian P. Luse  
Attorneys for Defendants



Electronically filed this  
4<sup>th</sup> day of October, 2013 with:

Clerk of the U.S. District Court  
for the District of Arizona  
401 W. Washington  
Phoenix, Arizona 85003

I hereby certify that on October 4, 2013 that I emailed a copy of the same to counsel, Kelly Henry and Dale Baich. I further certify that I emailed copies to Ms. Kristine Fox, Capital Case Staff Attorney for the District of Arizona and Ms. Margaret Epler, Capital Case Staff Attorney for the Sixth Circuit.

By: Kelly Gillilan-Gibson  
3565528



1 Plaintiffs allege that correspondence to the Court from former Board member Thomas  
2 submitted pursuant to this Court's order of October 1, 2013, demonstrates that Defendant  
3 Board member Kirschbaum misled the court and may have committed perjury. The Court  
4 considered Thomas's letter prior to issuing its detailed ruling and found no discrepancy that  
5 warranted either further evidentiary exploration or called into question Kirschbaum's  
6 credibility. Kirschbaum testified that the three members not reappointed in April 2012 were  
7 her good friends and that she was aware they believed they had been ousted because of their  
8 vote in the Flibotte case. This is essentially what she apparently tried to communicate to  
9 Thomas by showing him the Flibotte clemency recommendation letter. Kirschbaum also  
10 testified that she "did not know" whether she shared her former Board members' belief about  
11 the reason for *their* ouster and that she did not believe *her* votes would affect whether she got  
12 reappointed at the expiration of her term. Nothing in Thomas's correspondence contradicts  
13 this testimony. Moreover, the Court accepted as true that Governor Brewer's failure to  
14 reappoint the former Board members was driven, at least in part, by dissatisfaction with those  
15 members' past votes.

16 **IT IS THEREFORE ORDERED** that Plaintiffs' Rule 59 Motion to Reconsider  
17 Order Denying Preliminary Injunction (**Doc. 32**) is **DENIED**.

18 DATED this 4<sup>th</sup> day of October, 2013.

19  
20  
21  
22 

23 Roslyn O. Silver  
24 Senior United States District Judge  
25  
26  
27  
28



Plaintiffs, Edward Schad and Robert Jones, hereby notice their appeal of this Court's Orders dated October 1 and October 4, 2013. Doc. Nos. 21, 30, 34.

Respectfully submitted this 4<sup>th</sup> day of October, 2013.

Kelley J. Henry  
Supervisory Asst. Federal Public Defender  
Denise Young, Esq.

By s/Kelley J. Henry  
Counsel for Plaintiff Edward Harold Schad

Jon Sands  
Federal Public Defender  
Dale Baich  
Timothy M. Gabrielson  
By s/Dale Baich  
Counsel for Plaintiff Robert Glen Jones, Jr.

### **Certificate of Service**

I hereby certify that on October 4, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona. I also certify that I emailed a copy of the same to counsel, Dale Baich, Kelly Gibson and Brian Luse. I further certify that I emailed copies to Ms. Kristine Fox, Capital Case Staff Attorney for the District of Arizona and Ms. Margaret Epler, Capital Case Staff Attorney for the Sixth Circuit.

Kelley J Henry  
Counsel for Edward Schad

**U.S. District Court  
DISTRICT OF ARIZONA (Phoenix Division)  
CIVIL DOCKET FOR CASE #: 2:13-cv-01962-ROS**

Schad v. Brewer et al  
Assigned to: Senior Judge Roslyn O Silver  
Related Cases: [2:97-cv-02577-ROS](#)  
[2:13-cv-02001-ROS](#)  
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 09/26/2013  
Jury Demand: None  
Nature of Suit: 550 Prisoner: Civil Rights  
Jurisdiction: Federal Question

**Plaintiff**

**Edward Harold Schad, Jr.**

represented by **Denise I Young**  
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Fax: 520-322-9706  
Email: [dyoung3@mindspring.com](mailto:dyoung3@mindspring.com)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Kelley J Henry**  
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V.

**Intervenor Plaintiff**

**Robert Glen Jones, Jr.**

represented by **Dale A Baich**  
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**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

V.

**Defendant**

**Janice K Brewer**

*Governor of the State of Arizona, in her  
official capacity*

represented by **Brian Patrick Luse**  
Office of the Attorney General  
1275 W Washington St  
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**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Kelly Elaine Gillilan-Gibson**  
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Fax: 602-542-4385  
Email: adminlaw@azag.gov  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Defendant**

**Scott Smith**

*Chief of Staff to Governor Brewer, in his  
official capacity*

represented by **Brian Patrick Luse**  
(See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Kelly Elaine Gillilan-Gibson**  
(See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Defendant**

**Brian Livingston**

*Chairman and Executive Director, Arizona  
Board of Executive Clemency*

represented by **Brian Patrick Luse**  
(See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Kelly Elaine Gillilan-Gibson**

(See above for address)

**LEAD ATTORNEY****ATTORNEY TO BE NOTICED****Defendant****Jack Lasota***also named as John "Jack" LaSota, Member,  
Arizona Board of Executive Clemency, in his  
official capacity*represented by **Brian Patrick Luse**

(See above for address)

**LEAD ATTORNEY****ATTORNEY TO BE NOTICED****Kelly Elaine Gillilan-Gibson**

(See above for address)

**LEAD ATTORNEY****ATTORNEY TO BE NOTICED****Defendant****Ellen Kirschbaum***Member, Arizona Board of Executive  
Clemency, in her official capacity*represented by **Brian Patrick Luse**

(See above for address)

**LEAD ATTORNEY****ATTORNEY TO BE NOTICED****Kelly Elaine Gillilan-Gibson**

(See above for address)

**LEAD ATTORNEY****ATTORNEY TO BE NOTICED****Defendant****Donna Harris***Member, Arizona Board of Executive  
Clemency, in her official capacity*represented by **Brian Patrick Luse**

(See above for address)

**LEAD ATTORNEY****ATTORNEY TO BE NOTICED****Kelly Elaine Gillilan-Gibson**

(See above for address)

**LEAD ATTORNEY****ATTORNEY TO BE NOTICED**

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
09/26/2013	<a href="#"><u>1</u></a>	PRISONER CIVIL RIGHTS COMPLAINT filed by Edward Harold Schad, Jr. (submitted by Kelley Henry) (Attachments: # <a href="#"><u>1</u></a> Exhibit A, # <a href="#"><u>2</u></a> Exhibit B, # <a href="#"><u>3</u></a> Exhibit C, # <a href="#"><u>4</u></a> Exhibit D, # <a href="#"><u>5</u></a> Exhibit E, # <a href="#"><u>6</u></a> Exhibit F, # <a href="#"><u>7</u></a> Exhibit G, # <a href="#"><u>8</u></a> Exhibit H, # <a href="#"><u>9</u></a> Exhibit I, # <a href="#"><u>10</u></a> Declaration)(MHU) (Entered: 09/26/2013)
09/26/2013	<a href="#"><u>2</u></a>	APPLICATION for Leave to Proceed In Forma Pauperis by Edward Harold Schad, Jr. (submitted by Kelley Henry) (MHU) (Entered: 09/26/2013)
09/26/2013	<a href="#"><u>3</u></a>	NOTICE OF ASSIGNMENT: (MHU) (Entered: 09/26/2013)
09/26/2013	<a href="#"><u>4</u></a>	NOTICE TO FILER OF DEFICIENCY re <a href="#"><u>1</u></a> Complaint, filed by Edward Harold Schad, Jr. Description of deficiency: Civil Cover Sheet not submitted. (MHU) (Entered: 09/26/2013)
09/27/2013	<a href="#"><u>5</u></a>	NOTICE re Civil Cover Sheet by Edward Harold Schad, Jr . (Henry, Kelley) (Entered: 09/27/2013)
		ER Page 383

09/27/2013	<a href="#">6</a>	MOTION for Temporary Restraining Order, MOTION for Preliminary Injunction by Edward Harold Schad, Jr. (Attachments: # <a href="#">1</a> Exhibit Attachment J)(Henry, Kelley) (Entered: 09/27/2013)
09/27/2013	<a href="#">7</a>	ORDER that Defendants shall file a response to Plaintiff's Motion for Temporary Restraining Order or a Preliminary Injunction no later than 9:00 a.m. on Monday, September 30, 2013. Defendants' response should be accompanied by the appropriate affidavits and should indicate whether Defendants are willing to reschedule Plaintiff's reprieve/commutation hearing for a date later than October 2, 2013, but prior to October 9, 2013. The response should also indicate which Defendants are available to testify on September 30, 2013, at 2:00 p.m. No reply is permitted absent further order of the Court. FURTHER ORDERED that a hearing on Plaintiff's motion will be held on Monday, September 30, 2013, at 2:00 p.m. in Courtroom 604. FURTHER ORDERED that the Clerk of Court shall forthwith email a copy of this Order as well as Plaintiffs Complaint for Equitable, Injunctive and Declaratory Relief (Doc. 1) and Plaintiff' Motion for Temporary Restraining Order or a Preliminary Injunction (Doc. <a href="#">6</a> ), to Joseph Sciarrotta, Jr., General Counsel, Office of the Governor; Kelly Gillilan-Gibson, Assistant Arizona Attorney General, Arizona Board of Executive Clemency; and Brian Luse, Assistant Arizona Attorney General, Arizona Board of Executive Clemency. Signed by Senior Judge Roslyn O Silver on 9/27/13. (MAP) (Entered: 09/27/2013)
09/28/2013	<a href="#">8</a>	MOTION to Intervene by Robert Glen Jones, Jr. (Attachments: # <a href="#">1</a> Exhibit, # <a href="#">2</a> Text of Proposed Order)(Gabrielsen, Timothy) (Entered: 09/28/2013)
09/30/2013	<a href="#">9</a>	RESPONSE in Opposition re <a href="#">6</a> MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by Janice K Brewer, Donna Harris, Ellen Kirschbaum, Jack Lasota, Brian Livingston, Scott Smith. (Attachments: # <a href="#">1</a> Exhibit Exhibits A thru F)(Gillilan-Gibson, Kelly) (Entered: 09/30/2013)
09/30/2013	<a href="#">10</a>	ORDER the hearing set for September 30, 2013 is RESET for October 1, 2013 at 3:00 p.m. IT IS FURTHER ORDERED Plaintiff shall file a reply in support of the Motion for Temporary Restraining Order no later than 9:00 a.m. on October 1, 2013. IT IS FURTHER ORDERED Defendants shall file a response to Robert Glen Jones, Jr.'s Motion to Intervene <a href="#">8</a> no later than 9:00 a.m. on October 1, 2013. Signed by Senior Judge Roslyn O Silver on 9/30/13. (CLB) (Entered: 09/30/2013)
10/01/2013	<a href="#">11</a>	REPLY to Response to Motion re <a href="#">6</a> MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by Edward Harold Schad, Jr. (Henry, Kelley) (Entered: 10/01/2013)
10/01/2013	<a href="#">12</a>	RESPONSE to Motion re <a href="#">8</a> MOTION to Intervene filed by Janice K Brewer, Donna Harris, Ellen Kirschbaum, Jack Lasota, Brian Livingston, Scott Smith. (Gillilan-Gibson, Kelly) (Entered: 10/01/2013)
10/01/2013		NOTICE of request for e-notices by Dale A. Baich. (Baich, Dale) (Entered: 10/01/2013)
10/01/2013	<a href="#">13</a>	ORDER that the Motion of Robert Glen Jones, Jr., to Intervene (Doc. <a href="#">8</a> ) is GRANTED. Robert Glen Jones, Jr., shall file his complaint no later than October 1, 2013. Signed by Senior Judge Roslyn O Silver on 10/1/2013.(KMG) (Entered: 10/01/2013)
10/01/2013	<a href="#">14</a>	MOTION to Quash Subpoena by Janice K Brewer, Donna Harris, Ellen Kirschbaum, Jack Lasota, Brian Livingston, Scott Smith. (Attachments: # <a href="#">1</a> Exhibit)(Gillilan-Gibson, Kelly) (Entered: 10/01/2013)
10/01/2013	<a href="#">15</a>	INTERVENOR COMPLAINT filed by Robert Glen Jones, Jr. (Attachments: # <a href="#">1</a> Civil Cover Sheet, # <a href="#">2</a> Application to Proceed IFP)(Gabrielsen, Timothy) (Entered: 10/01/2013)
10/01/2013	<a href="#">16</a>	*Joinder re <a href="#">6</a> to Plaintiff Schad's Motion for Temporary Restraining Order and/or Preliminary Injunction by Robert Glen Jones, Jr . (Gabrielsen, Timothy) *Modified to include document relationship on 10/2/2013 (KMG). (Entered: 10/01/2013)
10/01/2013	<a href="#">17</a>	RESPONSE to Motion re <a href="#">14</a> MOTION to Quash Subpoena filed by Edward Harold Schad, Jr. (Henry, Kelley) (Entered: 10/01/2013)

10/01/2013	<a href="#">18</a>	TRANSCRIPT REQUEST by Robert Glen Jones, Jr. for proceedings held on 10/01/2013 before Judge Silver. (Gabrielsen, Timothy) (Entered: 10/01/2013)
10/01/2013	<a href="#">19</a>	ORAL MOTION to Deny Motion for Temporary Restraining Order by Janice K Brewer, Donna Harris, Ellen Kirschbaum, Jack LaSota, Brian Livingston, Scott Smith. (LMR) (Entered: 10/01/2013)
10/01/2013	<a href="#">20</a>	MINUTE ENTRY for proceedings held before Senior Judge Roslyn O Silver: Motions Hearing held on 10/1/2013. Motions Taken Under Advisement: <a href="#">6</a> MOTION for Temporary Restraining Order and Motion for Preliminary Injunction, <a href="#">14</a> MOTION to Quash Subpoenas to Produce Documents and 19 ORAL MOTION to Deny Motion for Temporary Restraining Order. (Court Reporter Linda Schroeder.) Hearing held 3:53 PM to 7:12 PM.(LMR) (Entered: 10/01/2013)
10/01/2013	<a href="#">21</a>	ORDER denying <a href="#">6</a> Motion for TRO; granting <a href="#">14</a> Motion to Quash; denying as moot 19 Motion to Dismiss Motion for TRO. Signed by Senior Judge Roslyn O. Silver on 10/1/2013.(ROS, kb) (Entered: 10/01/2013)
10/01/2013	<a href="#">22</a>	*NOTICE OF INTERLOCUTORY APPEAL to 9th Circuit Court of Appeals re: <a href="#">21</a> Order on Motion for TRO, Order on Motion to Quash, Order on Motion to Dismiss Party by Edward Harold Schad, Jr. (Henry, Kelley) *Modified to indicate "Interlocutory" on 10/2/2013 (KMG). (Entered: 10/01/2013)
10/01/2013	<a href="#">23</a>	Exhibit List (TRO) by Edward Harold Schad, Jr.. (KMG) (Entered: 10/02/2013)
10/01/2013	<a href="#">24</a>	Witness List (TRO) by Janice K Brewer, Donna Harris, Ellen Kirschbaum, Jack Lasota, Brian Livingston, Scott Smith. (KMG) (Entered: 10/02/2013)
10/01/2013	<a href="#">25</a>	Witness List (TRO) by Edward Harold Schad, Jr. (KMG) (Entered: 10/02/2013)
10/01/2013	<a href="#">28</a>	APPLICATION for Leave to Proceed In Forma Pauperis by Robert Glen Jones, Jr. (Note: Incorrectly filed with the Intervenor Complaint at doc.#15) (KMG) (Entered: 10/03/2013)
10/01/2013	<a href="#">29</a>	Prisoner Trust Fund Account Statement by Robert Glen Jones, Jr. (Note: Incorrectly filed with the Intervenor Complaint at doc.#15) (KMG) (Entered: 10/03/2013)
10/02/2013	<a href="#">26</a>	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Motion Hearing - Volume I Proceedings held on 10/1/2013, before Judge Silver re: <a href="#">22</a> Notice of Appeal . Court Reporter Linda Schroeder. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 10/23/2013. Redacted Transcript Deadline set for 11/4/2013. Release of Transcript Restriction set for 12/31/2013. (VPB) (Entered: 10/02/2013)
10/02/2013	<a href="#">27</a>	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Motion Hearing - Volume II for dates of 10/1/2013 before Judge Silver re: <a href="#">22</a> Notice of Appeal. Court Reporter Elizabeth Lemke. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 10/23/2013. Redacted Transcript Deadline set for 11/4/2013. Release of Transcript Restriction set for 12/31/2013. (VPB) (Entered: 10/02/2013)
10/03/2013	<a href="#">31</a>	LETTER to the Court from Melvin Thomas (MAP) (Entered: 10/04/2013)
10/04/2013	<a href="#">30</a>	ORDER denying <a href="#">6</a> Motion for a Temporary Restraining Order and/or Preliminary Injunction. Signed by Senior Judge Roslyn O Silver on 10/4/13.(MAP) (Entered: 10/04/2013)
10/04/2013	<a href="#">32</a>	Emergency MOTION for Reconsideration re <a href="#">30</a> Order on Motion for Preliminary Injunction, <a href="#">21</a> Order on Motion for TRO, Order on Motion to Quash, Order on Motion to Dismiss Party by Edward Harold Schad, Jr. (Henry, Kelley) (Entered: 10/04/2013)
10/04/2013	<a href="#">33</a>	RESPONSE to Motion re <a href="#">32</a> Emergency MOTION for Reconsideration re <a href="#">30</a> Order on Motion

		for Preliminary Injunction, <a href="#">21</a> Order on Motion for TRO, Order on Motion to Quash, Order on Motion to Dismiss Party filed by Janice K Brewer, Donna Harris, Ellen Kirschbaum, Jack Lasota, Brian Livingston, Scott Smith. (Gillilan-Gibson, Kelly) (Entered: 10/04/2013)
10/04/2013	<a href="#">34</a>	ORDER denying <a href="#">32</a> Plaintiffs' Rule 59 Motion for Reconsideration of order denying preliminary injunction. Signed by Senior Judge Roslyn O. Silver on 10/4/2013.(ROS, kb) (Entered: 10/04/2013)
10/04/2013	<a href="#">35</a>	AMENDED NOTICE OF APPEAL to 9th Circuit Court of Appeals re: <a href="#">30</a> Order on Motion for Preliminary Injunction, <a href="#">21</a> Order on Motion for TRO, Order on Motion to Quash, Order on Motion to Dismiss Party, <a href="#">34</a> Order on Motion for Reconsideration by Edward Harold Schad, Jr and Robert Glen Jones, Jr.. (Henry, Kelley) (Entered: 10/04/2013)

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